Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED
JANUARY 19, 1994
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* * * * *

The following opinions and orders have been omitted in printing this joint appendix pursuant to S. Ct. R. 26.1, because they appear on the following pages in the appendix to the petition for a writ of certiorari:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION,
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WASHINGTON, D.C. 20004, (202) 783-4444

and

NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 143,
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and

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and

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(214) 270-0769

and

ALL SIMILARLY SITUATED UNNAMED PLAINTIFFS,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

v.

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DEFENDANTS

SECOND AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs bring this class action to challenge the constitutionality of Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) insofar as it prohibits federal employees from receiving honoraria for an appearance, speech or article and subjects federal employees to civil penalties for receipt of such honoraria.

Plaintiff National Treasury Employees Union ("NTEU") is a federal-sector labor union that represents over 140,000 federal employees nationwide. Plaintiff NTEU Chapter 143 (Chapter 143) is a local union chapter representing employees of the Customs Service in El Paso, Texas. Plaintiff Jan Adams Grant is a federal employee and member of NTEU, employed by the Internal Revenue Service at its Service Center in Ogden, Utah.

Plaintiff Grant writes articles for various magazines and delivers speeches to local community organizations for remuneration. Plaintiff Thomas C. Fishell is a federal employee, employed by the Internal Revenue Service at its District Office in Dallas, Texas, and chief steward and executive vice-president of NTEU Chapter 46. Plaintiff Fishell is an ordained minister who delivers speeches and sermons at area churches for remuneration.

Plaintiffs in this suit seek a declaration that the provision of the Ethics Reform Act of 1989 prohibiting federal employees from receiving honoraria for speeches, articles, and appearances violates the Constitution of the United States, specifically the First and Fifth Amendments, and that the implementing regulations by the Office of Government Ethics violate the Administrative Procedure Act, 5 U.S.C. 706(2)(A). In addition to declaratory relief, plaintiffs seek an order enjoining defendants from enforcing the provision at issue.

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1391(e).

VENUE

2. Venue is properly laid before this Court in accordance with 28 U.S.C. 1391(e).

PARTIES

3. Plaintiff NTEU is an unincorporated association having its principal place of business at 901 E Street, N.W., Suite 600, Washington, D.C. 20004. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, NTEU is the exclusive bargaining representative of approximately 140,000 federal emp-

ployees who work in locations across the nation. NTEU represents the interests of the employees within its bargaining units by, among other things, negotiating collective bargaining agreements, arbitrating grievances, filing unfair labor practices, lobbying, and litigating employees' collective and individual rights in the federal courts. Certain of NTEU's members, as well as nonmember employees within NTEU's bargaining units, receive income from articles, speeches, or appearances. The activities are performed in nonwork time and are compatible with the full and proper discharge of the employees' official duties and responsibilities. NTEU sues here on behalf of its members and all employees within its bargaining units whose constitutional rights have been, and will be, violated by the enforcement or threatened enforcement of this statute.

4. Plaintiff NTEU Chapter 143 is a local NTEU chapter representing bargaining unit employees employed by the U.S. Customs Service in El Paso, Texas. Its principal place of business is 3211 East Yandell, El Paso, TX 79903. The Chapter provides representation and services to bargaining unit members at the local level. These activities include collective bargaining, grievance arbitration, and filing unfair labor practice complaints. Such activities also include organizing concerted action by bargaining unit employees, such as demonstrations, letter-writing campaigns, and lobbying. The Chapter also informs employees of their legal rights, notifies them of important opportunities and deadlines, and keeps them abreast of union activities on the local and national levels. The Chapter holds elections to select chapter officers and representatives to national NTEU activities, and holds meetings to determine future activities and discuss the Chapter's position with regard to actions taken by management. To perform these functions adequately, the

Chapter requires a newsletter to communicate with bargaining unit employees. In the past, it has paid a government employee to write and edit its newsletter. That employee has refused to continue writing the newsletter because he can no longer accept payment for his writing. Because the Chapter cannot find an qualified government employee who will write the newsletter without compensation or a qualified nongovernment employee who will produce the newsletter for the sum available, it has ceased to publish its newsletter.

5. Plaintiff Jan Adams Grant is employed by the Internal Revenue Service as a tax examining assistant at its Ogden, Utah, Service Center. Prior to January 1, 1991, Grant wrote articles for publication in magazines such as *Woman's Day, Sierra,* and *Camping Today,* on subjects related to the environment and outdoor activities. Grant also regularly delivered speeches to local church groups on earthquake preparedness. Grant received remuneration for her articles and speeches. She had solicited and received approval of the IRS for this outside employment. Grant is subject to the restriction on receipt of compensation and ceased submitting articles for publication and delivering speeches following the effective date of that restriction.

6. Plaintiff Thomas C. Fishell is employed by the IRS as a tax examining assistant at its District Office in Dallas, Texas. Fishell is also a self-employed ordained and licensed minister who regularly conducts funerals and weddings, delivers sermons and makes other speeches to church groups on religious topics and on church administrative subjects. Fishell received remuneration for these activities. Fishell solicited and received permission from the IRS in 1984 to engage in this outside employment. Fishell is subject to the restriction on receipt of compensation for delivery of speeches and sermons during

worship services conducted by other ministers. Following January 1, 1991, Fishell has severely curtailed these activities, cancelling a sermon that he was to have delivered during worship services conducted by another minister.

7. Similarly situated unnamed plaintiffs are every "employee" of the federal government, as defined by the interim rule issued at 5 Fed. Reg. 1723 (January 17, 1991), to be codified at 5 C.F.R. 2636.102(c) & (d), below grade GS-16, who—but for 5 U.S.C. app. 501(b)—would receive "honoraria" as defined in 5 U.S.C. app. 505(3).

8. Defendant United States is properly named because the suit challenges the constitutionality of a federal statute.

9. Defendant Richard Thornburgh, named in his capacity as Attorney General of the United States, is charged with enforcement of this statute. 5 U.S.C. app [*sic*] Sec. 504(a) provides, in pertinent part, that "[t]he Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of section 501. . . ."

10. Defendant Stephen D. Potts is named in his capacity as Director of the Office of Government Ethics. Defendant Office of Government Ethics ("OGE") is charged with administrative authority, under 5 U.S.C. app. 503, to issue rules and regulations under this Title with respect to officers and employees of the executive branch.

STATEMENT OF CLAIMS

11. Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) was enacted on November 30, 1989, and took effect on January 1, 1991. Sec. 603. Sec. 501(b) states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." Sec. 505 defines "officer or employee" as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the

Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code)." Sec. 505 further defines "honorarium" as "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses . . . .

12. Section 504 of that title provides that "[t]he Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of section 501. . . . The court in which such action is brought may assess against such individual a civil penalty of not more than $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater."

13. Defendant Office of Government Ethics issued interim regulations on January 17, 1991, effective January 1, 1991. 5 C.F.R. Part 2636, 56 Fed. Reg. 1721 (Jan. 17, 1991). The regulations, among other things, define "article" as "a writing, other than a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings" but does not include "works of fiction, poetry, lyrics, or script." 56 Fed. Reg. at 1726. It defines "speech" at "an address, oration, or other form of oral presentation." 56 Fed. Reg. at 1725. The regulations further state that a "speech" does not include "the conduct of worship services or regligious ceremonies" but does include "a talk on theology given to other ministers, . . . offering a prayer at the opening of a convention or . . . delivering a sermon during a worship service conducted by another minister." 56 Fed. Reg. at 1725-26.

14. Plaintiff Grant is an "employee" within the meaning of the title. Grant has an advanced degree in geophysics. With the permission of her agency, she has long

been engaged in writing non-fictional articles for publication and delivering speeches in her nonwork time in exchange for remuneration. The articles, published in magazines, address a variety of environmental issues. The speeches, delivered to local church groups, concern earthquake preparedness. The subject-matter of her articles and speeches is entirely unrelated to her duties and responsibilities as a federal employee. She estimates that she received approximately $3000 from her writing and speeches in 1990.

15. Plaintiff Grant is also engaged in writing a book of fiction with some factual basis, tentatively titled *The Green Shovel.* She has submitted three chapters to a publisher, Morrow & Son. Publishers more readily accept a book manuscript for publication from a new author when that author has published numerous articles in magazines.

16. Because of the enactment of the ban on receipt of compensation for article writing and speeches, plaintiff Grant has ceased delivering speeches and submitting query letters to magazine publishers. A query letter is a proposal for an article to be submitted for publication.

17. Plaintiff Grant will suffer continuing and irreparable harm if the requested relief is denied. Absent a declaration that the prohibition on receipt of payment is unconstitutional and its enforcement enjoined, Grant will not submit articles for publication or deliver speeches. Without the additional professional activity that the publication of articles represents, Grant may encounter greater difficulty in securing a publisher for the book that she is currently writing.

18. As a professional writer and speaker, Grant is entitled to payment for her articles and speeches. Grant incurs significant expenses in connection with her expressive

activity, including such capital expenses as the purchase of word processing equipment, magazine subscriptions, and relevant research literature. Grant has also invested significant time and expense in acquiring the educational background necessary for her writing and speaking. In devoting her time to writing and speaking, Grant has foregone opportunities to engage in other activity for which she could lawfully accept compensation. Compensation for her writing and speaking is an incentive that encourages her to write and speak, and the ban on receipt of payment is a penalty on her choice to engage in that activity, rather than some other income-producing activity.

19. Plaintiff Thomas C. Fishell is an "employee" within the meaning of the title. He is also a self-employed ordained and licensed minister. With the permission of his agency and on nonwork time, Fishell delivery sermons during worship services conducted by other minister, as well as sermons during his worship services, and presents speeches to local church groups on religious topics and on church administrative matters. In the past, Fishell has accepted compensation for these activities. His net income from all of his outside religious activities in 1990 was approximately $1000.

20. Because of the ban on receipt of payment for speeches and appearances, plaintiff Fishell has cancelled a sermon that he was to have delivered as a guest minister during a worship service conducted by another minister.

21. Plaintiff Fishell will suffer continuing and irreparable harm if the requested relief is denied. A prohibition on the receipt of income from his appearances and speaking engagements will directly burden his ability and willingness to engage in such activity. Fishell has incurred considerable expense in pursuing his theological education and continues to incur expenses in connection with his

speeches and sermons as visiting minister, including the purchase of books and treatises and word processing equipment. Even assuming that he could recoup such expenses, he requires payment as compensation for his time and training. The payment serves as a partial substitute for payment that he could have earned in other activity, had he not devoted his time to the speeches and sermons in question. The payment is also an incentive to pursue such activity, and the ban on receipt of payment is a penalty on his choice to engage in that activity, rather than some other income-producing activity.

22. Plaintiff NTEU is the recognized collective bargaining representative for plaintiffs Grant and Fishell, as well as other federal employees who either are currently or will be writing articles or making speeches or appearances for recompense. NTEU's responsibilities as representative of federal employees include vigorous advocacy of members' rights, including their First Amendment right to make speeches and appearances and to write articles. The First and Fifth Amendment rights of NTEU's members are directly burdened by the prohibition on receipt of income from specches, appearances, and articles.

23. Plaintiff NTEU Chapter 143 requires a regularly published newsletter in order to perform adequately the functions of a chapter set forth above at paragraph 4. A newsletter serves as the union organ, alerting bargaining unit members yo union and management activities, notifying them of important dates and deadlines, announcing union meetings and elections, and describing employee rights and opportunities for advancement. The newsletter is also a means for the Chapter to inform employees of the official position taken by the Chapter with respect to matters of concern to bargaining unit members.

24. Before January 1, 1991, Chapter 143 paid an employee of the U.S. Customs Service in El Paso, Texas,

$100 a month to write articles for the newsletter, on a non-contractual basis. By relying on the paid services of one individual, the Chapter was able to assure the regular, timely publication of a comprehensive, well-written, and well-informed newsletter for use by the Chapter, its members, and other bargaining unit employees.

25. Following the effective date of the ban on receipt of payment for articles, the newsletter writer could no longer accept compensation for writing the newsletter. He refused to continue writing the newsletter without compensation.

26. The Chapter has been unable to find a qualified Customs employee to write the newsletter on a volunteer basis, without compensation, or a qualified individual, who is not a government employee, who was willing to write the newsletter for a fee that meets the Chapter's budget. The Chapter has been unable to publish a newsletter in 1991 as a result of the ban on receipt of compensation for article writing. The discontinuation of the newsletter has seriously harmed the Chapter by hindering its communication with represented employees.

CLASS ACTION ALLEGATIONS

27. This class action may be maintained under Fed. R. Civ. P. 23(a) and 23(b)(2).

28. In addition to the named plaintiffs, the class includes all "employees" of the federal government, as defined by the interim rule issued at 56 Fed. Reg. 1723 (January 17, 1991), to be codified at 5 C.F.R. 2636.102(c) & (d), below grade GS-16, who—but for 5 U.S.C. app. 501(b)—would receive "honoraria," as defined in 5 U.S.C. app. 505(3). The precise size of this class is unknown, but it potentially includes hundreds or thousands of individuals dispersed throughout the United States, and thus constitutes a class too numerous to bring before the court individually.

29. There are questions of law or fact common to all members of the class. Each member of the class receives or would receive honoraria, as defined in section 505, for an appearance, speech or article, were it not for the Ethics Reform Act's prohibition against their receipt. The prohibition against receipt of honoraria directly burdens the First and Fifth Amendment rights of each member of the class. The prohibition is unconstitutional on its face and as applied because it is arbitrary, overbroad and not justified by a sufficient government interest.

30. The claims of the named plaintiffs are typical of the class; the First and Fifth Amendment rights of the named and unnamed plaintiffs are all violated by the Ethics Reform Act.

31. The representative plaintiffs will adequately and fairly protect the interests of the class. Plaintiff NTEU is a federal sector labor organization that represents 140,000 federal employees nationwide through collective bargaining, lobbying and litigation. NTEU has significant experience representing federal workers in lawsuits challenging illegal and unconstitutional government action. The named plaintiffs have suffered or will suffer injuries for a cause identical to those of the unnamed plaintiffs. Relief may be granted to the class without any adverse effect upon any other class member.

32. The class action is maintainable under Fed. R. Civ. P. 23(b)(2) because defendants have acted to violate the First and Fifth Amendment rights of the named and unnamed class members in a manner generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

CAUSES OF ACTION

33. Plaintiffs reassert and reallege each and every allegation in paragraphs 1 through 32 above.

34. The First Amendment to the United States Constitution protects the right of individuals to freedom of speech. The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

35. Prohibiting federal employees from receiving income from speeches, articles or appearances unrelated to their federal employment directly burdens and severely impedes their exercise of their right to engage in such activities without serving any legitimate government purpose.

36. The statute challenged above, both as written and as constued by the Office of Government Ethics, violates the First and Fifth Amendments to the United States Constitution because it is arbitrary, vague, and overbroad.

37. The statute violates the First Amendment because it is not narrowly drawn to satisfy only legitimate government interests.

38. The regulations issued by the Office of Government Ethics are arbitrary and capricious, in violation of 5 U.S.C. 706(2)(A).

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiffs request judgment against the defendants:

A. Declaring that Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) is unconstitutional on its face and as applied, insofar as it prohibits plaintiffs from receiving honoraria for an appearance, speech or article and subjects them to civil penalties for receipt of such honoraria;

B. Enjoining defendants from enforcing the prohibition on receipt of honoraria against plaintiffs;

C. Ordering defendants to pay a reasonable amount of attorney's fees and costs as determined by the Court;

D. Ordering such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Gregory O'Duden

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[April 30, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA. No. 90-3027

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, 80 F STREET, N.W., WASHINGTON, D.C. 20001 (202) 639-6426

and

DAVID E. HUBLER 4109 BREEZEWOOD LANE, ANNANDALE, VIRGINIA 22003, (703) 354-8709, PLAINTIFFS

v.

UNITED STATES OF AMERICA,

and

RICHARD L. THORNBURGH, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, 10TH AND CONSTITUTION AVENUE, N.W., WASHINGTON, D.C. 20530, (202) 514-2000

and

STEPHEN D. POTTS, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, 1201 NEW YORK AVENUE, N.W. SUITE 500, WASHINGTON, D.C. 20005, (202) 523-5757
DEFENDANTS

[13 DEC. 1990]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This is an action to challenge the constitutionality, and enjoin the enforcement of, Title VI, § 601(a) of the Ethics

Reform Act of 1989, Public Law 101-194, ("the Act") to the extent that it prohibits all federal employees from accepting payment or anything of value for an appearance, speech or article, and subjects them to civil penalties for violation of the prohibition. Plaintiffs seek (1) to obtain a declaration by the Court that this provision of Title VI of the Act is contrary to the First and Fifth Amendments to the United States Constitution and (2) to enjoin enforcement of said provision.

JURISDICTION

1. Jurisdiction in the matter is granted to the United States District Court pursuant to 28 U.S.C. § 1331.

VENUE

2. Venue is properly before this Court in accordance with 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff American Federation of Government Employees, AFL-CIO, ("AFGE") is a labor union representing approximately 700,000 federal employees worldwide, including those individual named plaintiffs in the instant action. AFGE seeks to preserve the economic, civil, and constitutional rights of its members through collective bargaining, lobbying and litigation. AFGE is suing on its own behalf, and on behalf of its members adversely affected by the prohibition against honoraria contained in Title VI of the Act.
4. Plaintiff David E. Hubler is presently employed as a "features writer" by the Voice of America, a component of the United States Information Agency,

located at 330 Independence Avenue, Room 3446, Washington, D.C. 20547. He is also a member of the bargaining unit represented by Local 1812 of the American Federation of Government Employees, AFL-CIO.

5. Defendant United States is properly named because the suit challenges the constitutionality of a federal statute.
6. Defendant Richard L. Thornburgh is the Attorney General of the United States and, as such, is responsible for enforcement of Title VI of the Act. He is sued solely in his official capacity.
7. Defendant Stephen D. Potts is the Director of the Office of Government Ethics, has administrative authority to issue rules and regulations under Title VI of the Act. He is sued solely in his official capacity.

FACTS

8. The Ethics Reform Act of 1989, enacted on November 30, 1989, is currently scheduled to take effect on January 1, 1991. The Act was intended to amend the Ethics in Goverment Act of 1978. It addresses a wide range of ethical questions arising in the context of government employment including, but not limited to, outside and post-employment activities of certain legislative and executive branch employees.
9. Title VI of the Act, amending Title V of the Ethics in Government Act of 1978, in part prohibits the receipt of honoraria by all federal employees. Specifically, Title VI amends § 501(b) and (c) of the earlier legislation to read:

> (b) HONORARIA PROHIBITION.—An individual may not receive any honorarium while

that individual is a Member, officer or employee.

(c) TREATMENT OF CHARITABLE CONTRIBUTIONS.—Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed $2000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

10. The Act defines "honorarium" as "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative). . . ." *Id.* In addition, "officer or employee" is therein defined as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (b) any special Government employee (as defined in section 202 of title 18, United States Code)." *Id.*

11. Plaintiff American Federation of Government Employees, AFL-CIO, ("AFGE") represents individuals in recognized bargaining units who are "employees" within the meaning of Title VI of the Act and whose rights under the First and Fifth Amendments to the United States Constitution will be violated by the challenged provision of the Ethics Reform Act.

12. Plaintiff Hubler has been employed by the Voice of America for fourteen years and has been a federal employee for twenty-four years. As a features writer

for the Voice of America, his duties involve writing pieces about American life and book reviews for purposes of broadcast over the Voice of America radio stations.

13. One of Mr. Hubler's interests, unrelated to his employment, which he pursues during off-duty hours is travel writing. He has been writing magazine and newspaper articles about travel on a free-lance basis for approximately ten years. His writing focuses primarily on areas in the Caribbean and Florida. Depending upon the length of the article, he receives approximately $500 to $1,500.

14. In 1990, plaintiff Hubler published three to four travel articles on a free-lance basis. Previous to becoming aware of the Ethics in Government Act of 1989, he had every expectation of continuing to publish articles, unrelated to his duties as a Voice of America employee, and receive payment for such publication after January 1, 1991. In addition, after January 1, 1991, some of his previously published articles will be reprinted for which he will receive payment.

15. The Act's prohibition against receipt of payment for his writings will effectively suppress Mr. Hubler's ability to write and publish articles. For instance, the expenses necessarily incurred in travel writing for which he receives payment extend beyond those that merely cover transportation and lodging, and would thereby be excluded under the Act. A prohibition against receipt of such expenses will impair his ability to engage in the type of activities about which he writes. Moreover, even if he were somehow able to underwrite his own travel writing and submit articles for free, he would not do so, as it would undermine

the ability of his colleagues, whose primary support derives from travel writing, from earning a living.

16. During the ten years that Mr. Hubler has been travel writing, he has cultivated and developed credibility and a reputation among the community of editors who determine whether his work gets published. The Act's prohibition will effectively remove him from contact with this community, which will, in turn, adversely affect his ability to write and publish travel articles.

17. Under the challenged legislation, the Attorney General has the power and duty to begin enforcement of the unconstitutional statutory provisions as of January 1, 1991, by bringing civil actions against federal employees found to be in violation. These employees face a penalty of up to $10,000.

CAUSES OF ACTION

COUNT I

18. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.

19. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the Press; or the right of the people peaceably to assemble, ..."

20. The prohibition against the receipt by any federal employee of payment for speeches, articles or appearances for matters completely unrelated to the employees' duties is unconstitutional on its face as it is overbroad in its restriction on federal employees' right to engage in speech otherwise protected under the First Amendment.

COUNT II

21. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.

22. The prohibition against the receipt by any federal employee of payment for speeches, articles or appearances for matters completely unrelated to the employees' duties is unconstitutional as applied to plaintiff Hubler as it impermissibly infringes upon his protected First Amendment rights to freedom of speech.

COUNT III

23. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.

24. The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

25. The broad prohibition against receipt of honorarium by any federal employee contained in Title VI of the Ethics Reform Act of 1989 violates the equal protection guarantee of the Fifth Amendment without serving any legitimate governmental purpose. Its distinction between those employees earning outside income and those receiving payment for engaging in speech impermissibly impinges upon federal employees' fundamental rights to freedom of speech.

COUNT IV

26. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.

27. The broad prohibition against receipt of honorarium by any federal employee contained in Title VI of the

Ethics Reform Act of 1989 violates the due process guarantee of the Fifth Amendment without serving any legitimate governmental purpose. It impermissibly deprives federal employees of their fundamental rights to liberty and property by prohibiting them from engaging freely in activities unrelated to their governmental employment and depriving them of the economic benefits of their off-duty expressive activities.

WHEREFORE, Plaintiffs pray that this Honorable Court enter an Order:

(1) Declaring that Title VI of the Ethics Reform Act of 1989 is unconstitutional;

(2) Enjoining Defendants and their agents from enforcing Title VI of the Ethics Reform Act of 1989.

(3) Ordering defendants to pay plaintiffs' attorney fees and costs; and

(4) Granting such other relief as this Court finds necessary and proper.

Respectfully submitted,

/s/ Mark D. Roth

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[December 13, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-3044 (TPJ)

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PLAINTIFFS

v.

UNITED STATES OF AMERICA, RICHARD THORNBURGH, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, 100TH AND CONSTITUTION AVENUE, N.W., WASHINGTON, D.C. 20530

STEPHEN D. POTTS, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, 1201 NEW YORK AVENUE, N.W., SUITE 500 WASHINGTON, D.C. 20005, DEFENDANTS

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their attorney, complain of defendants as follows:

1. This is an action to challenge the constitutionality of Title VI of the "Ethics Reform Act of 1989," Public Law 101-194, 103 Stat. 1716, 1760-63 (November 30, 1989), as amended by Section 7 of Public Law 101-280, 104 Stat. 149, 161 (May 4, 1990), which amended Title V of the Ethics in Government Act of 1978, 5 U.S.C. §§ 501-05, insofar as it prohibits employees of the United States Government from receiving "honoraria," as defined therein, on and after January 1, 1991, and subjects them to civil penalties therefor. The statute that is the subject of this suit is hereinafter referred to as the "honorarium statute."

JURISDICTION

2. This Court has jurisdiction under 28 U.S.C. § 1331 over this action, which arises under the Constitution of the United States.

VENUE

3. Venue is properly laid in this jurisdiction under 28 U.S.C. § 1391(e) inasmuch as the defendants are the United States, officers thereof acting in their official capacity, and an agency thereof, and one or more defendants resides in this judicial district.

PARTIES

4. Plaintiff Peter G. Crane is a lawyer at the Nuclear Regulatory Commission in Rockville. He works on special projects in the Office of the General Counsel. On his own time, he has extensively researched the efforts of the Czarist government of Russia in the 1890s to model that country's economy after the economy of the United States. He plans to write an article for publication on this subject and to be paid for it. In addition, he is preparing to write for publication an article based on his great-grandfather's extensive interview with Leo Tolstoy in 1898; he believes this article, for which he expects to be paid, will contribute to the body of Tolstoy scholarship and will contain information not previously known to scholars. Mr. Crane has already published one article for pay since the honorarium statute took effect. Although he donated the payment to a charity, the Inspector General's office informed him that he was still considered to be in violation of the statute.

5. Plaintiff Richard Deutsch is employed by Voice of America, the international radio broadcast arm of the U.S. Information Agency, in Washington, D.C. He is business editor and a senior writer/correspondent on economics. On his own time and without using government resources, Deutsch has written more than 60 articles that have been published in an array of journals. Consistent with agency policy, Deutsch has received fees for his published articles. Had he not been allowed to receive such fees, he would have written fewer articles and devoted his extra time to other paying work. Since the honorarium statute went into effect, Mr. Deutsch has rejected various offers to publish for pay.

6. Plaintiff Charles Fager is a mailhandler for the U.S. Postal Service in Arlington, Virginia. For the past fifteen years he has been writing and speaking on topics related to

his church the Society of Friends or Quakers. He is occasionally offered payment for speaking engagements before Quaker groups. In March of 1991 he delivered a series of lectures at Guilford College in Greensboro, North Carolina. He was reimbursed for his expenses and paid a $300 fee. He had written to the appropriate agency official over three weeks in advance seeking clearance for his speaking activity. He finally received an oral response the day before he left for North Carolina. This obviously created great uncertainty. It was only because Mr. Fager had agreed to make this speaking appearance before the honorarium statute went into effect that the payment was not prohibited. He intends to engage in other speaking activities in the future and were it not for the honorarium statute, he would expect to receive payment when offered. Mr. Fager considers the prohibition of payment to be a disincentive to continue speaking and writing.

7. Plaintiff William H. Feyer is employed by the United States Department of Labor in New York, New York. He handles applications for certification of sheltered workshops and patient worker programs in the region encompassing New York, New Jersey, and the Caribbean. Feyer is also an ordained rabbi. During non-working hours, he travels throughout the United States and Canada delivering lectures, teaching classes, and leading seminars at churches, synagogues, and other spiritual centers. Feyer is paid for his rabbinic activities. He presently has scheduled many appearances throughout 1991 and early 1992. If he is not allowed to accept pay for these appearances, he may be forced to cancel his commitments.

8. Plaintiff Robert A. Gordon is an Aerospace Engineer at the Goddard Space Flight Center in Greenbelt, Maryland. For the past five years he has given various lectures on subjects related to Black History. He is normally

paid a fee for his efforts. In March of 1991 he delivered two lectures at the Maryland Institute of Art. He had already been informed by his Agency Ethics Officer that any payment above "actual and necessary" travel expenses would be in violation of the law. Because his travel expenses were de minimus he intends to deposit the payment checks into an escrow account pending the resolution of this case. Mr. Gordon relies on the small payments he receives for his lectures to continue funding his research expenses, which are often intangible or not linked to a particular lecture.

9. Plaintiff Judith Lynne Hanna, Ph.D., has been employed since September 1989 as an Education Program Specialist at the U.S. Department of Education in Washington, D.C. Before then, Dr. Hanna had been a Senior Research Scholar at the University of Maryland. She has written six books and more than 75 articles, and has lectured extensively in the fields of anthropology, ethnomusicology, dance ethnology, racial tension, and gender. She normally receives a fee or other payment for her articles and lectures. She has continued to write and lecture for a fee, with the approval of her agency, since becoming a federal government employee. She wishes to continue to do so, both for the added income and as a matter of professional development.

10. Plaintiff George J. Jackson, Ph.D., is a microbiologist for the Food and Drug Administration, U.S. Department of Health and Human Services, in Washington, D.C. He also writes dance reviews and lectures on dance for university and theatre audiences. He has written dance reviews regularly for the *Washington Post* since 1978 and for *Dance Magazine* in New York since 1985. He is paid for his articles on a per piece basis. He is also paid for some, but not all, of his lectures. Since the honorarium statute went into effect Dr. Jackson has been writing for

the *Post* without pay, but the *Post* considers this only a temporary arrangement as it ordinarily does not accept articles if they are simply "donated." In addition, the Dance Critics Association, of which he is the past President, strongly discourages its members to write for no pay. He wishes to continue writing and speaking on dance, as he has done for so many years, because it is something he enjoys immensely.

11. Plaintiff Eduard Mark, Ph.D., has been a historian for the Department of the Air Force for nine years. As a professional historian, he has written numerous essays, book reviews, and other pieces for publication and from time to time receives compensation for these writings. All of this work has been on his own time and is in full compliance with the extensive regulations of the Air Force on the subject of outside writing. He wishes to continue doing such writing, for compensation when that is otherwise appropriate, and believes that this activity is essential to his continued professional development as a scholar, a belief that is reinforced by the encouragement provided by his superiors.

12. Plaintiff Arnold A. Putnam is an Electronics Engineering Technician employed by the federal government at the Portsmouth Naval Shipyard in Portsmouth, New Hampshire. He prepares and develops engineering drawings for electronic equipment aboard nuclear submarines. On his own time, he writes articles in the areas of philosophy, American history, and the history of science and technology. He recently published an article discussing the "USS AGAMENTICUS" (a ship constructed during the Civil War), for which he was paid a fee. He is currently researching and writing several articles that he intends to publish in 1991. He will likely discontinue his research and writing if he is not allowed to receive any fees

upon the publication of his articles, because he needs such fees to defray the cost of his research.

13. Defendant United States of America is properly made a defendant herein because this suit challenges the constitutionality of a federal statute.

14. Defendant Richard Thornburg is made a defendant herein solely in his official capacity as Attorney General of the United States. In that capacity he is charged by 5 U.S.C. § 504(a) with enforcement of the honorarium statute.

15. Defendant Stephen D. Potts is made a defendant herein solely in his official capacity as Director of the Office of Government Ethics. Defendant Office of Government Ethics is made a defendant herein because it is charged by 5 U.S.C. § 503(2) with responsibility to issue rules and regulations under the honorarium statute with respect to officers and employees of the executive branch.

THE HONORARIUM STATUTE

16. The honorarium statute provides that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. § 501(b).

(a) For purposes of the honorarium statute, an "officer or employee" is defined to mean "any officer or employee of the Government except" Senate employees and "any special Government employee" (as defined in 18 U.S.C. § 202, which covers temporary government employees, part-time commissioners and magistrates, independent counsels, and members of the reserve forces when placed on active duty). 5 U.S.C. § 505(2).

(b) For purposes of the honorarium statute, the term "honorarium" is defined to mean "a payment of money or any thing of value for an appearance, speech or article" by

an officer or employee, but excluding payment of travel and related expenses. 5 U.S.C. § 503(3).

17. The honorarium statute is "subject to the rules and regulations of . . . the Office of Government Ethics . . . with respect to officers and employees of the executive branch. . . ." 5 U.S.C. § 503(2).

18. At the time the original complaint was filed defendant Office of Government Ethics had not issued any such rules or regulations. Instead, on November 28, 1990, that Office issued a "Memorandum" over the signature of defendant Potts which purports to provide "initial guidance regarding the application of" the honorarium statute.

(a) The Memorandum states that the content of it "has been coordinated with the Department of Justice and the Office of Personnel Management," that the Office of Government Ethics expects that implementing regulations "will be consistent in all respects" with the Memorandum, and that "employees may rely on the guidance contained in" the Memorandum.

(b) The Memorandum makes clear that, unlike the law and regulations in effect prior to January 1, 1991, the prohibition on receipt of honoraria "applies even without a nexus between the appearance, speech or article and the individual's federal employment.

(c) The Memorandum predicts that the definitions of "appearance, speech, or article" contained in 11 C.F.R. § 110.12(b), issued by the Federal Election Commission, would be adopted for purposes of the honorarium statute. However, the Memorandum goes on to set forth certain activities that will probably not be covered by the statutory prohibition, such as "works of fiction, poetry, lyrics and scripts."

(d) The Memorandum further states that the statutory prohibition will not cover compensation for "services on a

continuing basis that involve appearing, speaking or writing," but government employees are at the same time cautioned that they cannot circumvent the statutory prohibition "by contracting for a continuing series of talks, lectures, speeches or appearances and characterizing the income as a stipend or as salary."

19. On January 17, 1991 the Office of Government Ethics issued interim rules with request for comments. No final rules have been issued to date.

20. The honorarium statute provides for enforcement through civil actions by the Attorney General against any individual who violates 5 U.S.C. § 501 and provides that the court may assess against such an individual a civil penalty of $10,000 or the amount of compensation the individual received for the prohibited conduct, whichever is greater. 5 U.S.C. § 504(a).

21. The honorarium statute provides that it "shall take effect on January 1, 1991," but that it "shall cease to be effective" if Section 703 of the Ethics Reform Act of 1989, which provided for a 25 per cent pay raise for Members of the House of Representatives, for senior executive branch officers and employees, and for federal judges, is subsequently repealed. Pub. L. 101-194, Sec. 603. Said Section 703 has not been repealed. The honorarium statute went into effect on January 1, 1991.

EFFECT OF THE HONORARIUM STATUTE

22. Each plaintiff is an "officer or employee" of the executive branch within the meaning of the honorarium statute.

23. As set forth in greater detail in paragraphs 4 through 13 above, each plaintiff has in the past, while an "officer or employee," received compensation for making an "appearance," giving a "speech," or writing an

"article," as the quoted words are used in the honorarium statute as interpreted by the Memorandum dated November 28, 1990, referred to in paragraph 19 above. Each plaintiff would reasonably expect to continue doing so, but for the honorarium statute. In so doing, each plaintiff would be exercising his or her rights to speak and publish and, in the case of plaintiff Feyer, to practice his religion, all of which rights are protected by the First Amendment to the Constitution of the United States. The honorarium statute, by prohibiting receipt of compensation for such activities, imposes burdens, which are immediate and irreparable, on the exercise of these rights by plaintiffs.

CAUSE OF ACTION

24. The honorarium statute, both as written and as construed by the Office of Government Ethics, violates the First Amendment to the Constitution of the United States.

25. No government interest has been identified that justifies the overly broad imposition on plaintiffs of the burdens on their First Amendment rights summarized above.

26. The honorarium statute is not narrowly drawn to satisfy only such interest the government may legitimately have in restricting the speech and writing of government employees.

27. The honorarium statute, both as written and as construed by the Office of Government Ethics, is impermissibly vague in its description of the expressive activities that it covers, in violation of the First and Fifth Amendments.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment against defendants:

A. Declaring that Title VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended by Pub. L. 101-280) is unconstitutional insofar as it prohibits government officers and employees, as defined therein, from receiving honoraria, as defined therein.

B. Enjoining defendants from enforcing such prohibitions against plaintiffs.

C. Ordering such further and different relief, including costs and attorneys' fees, as to the Court may appear just and proper.

Respectfully submitted,

/s/ John Vanderstar

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Dated: April 11, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2922

NATIONAL TREASURY EMPLOYEES UNION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 90-3027

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 90-3044

PETER G. CRANE, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ORDER

Upon consideration of the several motions, the opposition thereto, and the arguments thereon in open court on December 20, 1990, it is, this 20th day of December 1990,

ORDERED, that the unopposed motion by Common Cause to participate as amicus curiae is granted; and it is

FURTHER ORDERED, that Civil Action No. 90-2922, Civil Action No. 90-3027 and Civil Action No. 90-3044 be consolidated for all purposes pending further order of Court; and it is

FURTHER ORDERED, that plaintiffs' application for a temporary restraining order is denied; and it is

FURTHER ORDERED, that plaintiffs' motion for a preliminary injunction is denied; and it is

FURTHER ORDERED, that plaintiffs' motion for a temporary restraining order pending the appeal of this Court's denial of their motion for a preliminary injunction is denied.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

EXHIBIT 1

DECLARATION OF PETER G. CRANE

1. I am a lawyer employed by the Nuclear Regulatory Commission and have been since April 1975. I received my A.B. degree from Harvard in 1968 and my J.D. from Duke in 1973. I have been in the Office of the General Counsel since 1977. My current position, which I have held for several years, is as Counsel for Special Projects. My current government grade level is GS-16. My home address is 4809 Drummond Avenue, Chevy Chase, Md. 20815.

2. Prior to joining the NRC, I wrote one article for publication and received payment for it. The article, entitled "Politics and Pesticides: Dieldrin Gets a Reprieve," appeared in The Washington *Post*, July 28, 1974, sharply criticized EPA's failure to order suspension of the pesticides aldrin and dieldrin. A copy of the article appeared in a 1974 Senate committee report on EPA's regulation of pesticides. Five days after the article appeared in the *Post*, the EPA Administrator issued a "Notice of Intention to Suspend" those chemicals. EPA's action was upheld by the U.S. Court of Appeals for the D.C. Circuit in *Environmental Defense Fund v. EPA*, 510 F.2d 1292 (1975).

3. Since becoming a government employee, I have maintained my interest in writing, and recently I began to act on that interest. I took a substantial period of leave without pay during 1990, both to spend more time with my family and to pursue writing projects in the area of history.

4. During that time, I did extensive research for an article on the efforts of the Czarist government of Russia, during the 1890's, to restructure the Russian economy in imitation of the economy of the United States. Entirely on my own time, I have drafted an article on those efforts of

a century ago, and on the parallels to present-day developments in the Soviet Union. More work remains to be done on the article, and I have yet to sell it to a publisher.

5. In addition, early in 1990 I commissioned a translation of the typescript of an article prepared by my great-grandfather in 1898 after he conducted an extensive interview with the writer Leo Tolstoy at Tolstoy's country home, Yasnaya Polyana. The typescript bears the handwritten additions, deletions, and corrections of both Tolstoy and his wife. (The diary of Tolstoy's wife for August 1898 includes mention of an evening spent making these corrections.) It is my intention, as time allows, to write an article discussing both the substance of the interview and the changes and deletions which the Tolstoys, apparently with a view to avoid offending the Czar's censors, made in the typescript. It is my belief that this article will contain information not previously known to Tolstoy scholars and will make at least a modest contribution to the body of Tolstoy scholarship.

6. I need hardly say that the subject matter of these articles has nothing to do with my work as an attorney for the U.S. Nuclear Regulatory Commission.

7. As I indicated, I have already expended substantial amounts of money (in terms of lost pay) in part so as to be able to pursue these writing projects. Moreover, if I am unable to accept payment for the two projects described above, it may mean that I will be unable to justify further expenses (for example, for travel to the Tolstoy Museum in Moscow) that may be essential if these articles are to be of the quality and completeness I would wish.

8. For the foregoing reasons, I believe that the new statute interferes with my First Amendment rights of free expression and operates to deprive me of property interests in preparatory work—research and writing—that I have already conducted with a view to publishing these

and other non-fiction articles. The statute disserves the public interest to the extent that any such writings may be informative or useful to the public. Moreover, in singling out the non-fiction article for adverse treatment, the statute betrays a forgetfulness of the roots of our First Amendment freedoms. The First Amendment was designed expressly to assure that the writers of non-fiction articles on issues of public concern would be permitted to compete freely in the marketplace of ideas; yet it is the non-fiction article, of all the different types of writing, that this statute singles out for punishment.

9. Thinking that it was important to draw public attention to the pernicious effects of the new law, I wrote an article and submitted it to the Washington *Post,* which printed it on January 6, 1991, under the title, "Arrest Me Officer, I'm Writing" (attached hereto as Exhibit *A*). On the following day, January 7, I was informed that the NRC's Office of the General Counsel had referred the matter to the agency's Inspector General for investigation. I wrote to the Inspector General the same day, forwarding a copy of the article and mentioning that I planned to donate to charity the $150 promised me by the newspaper. On January 17, 1991, two agents of the Inspector General interviewed me at length. They asked, among other things, whom I had spoken to at the Washington *Post,* who had written the headline (the newspaper's headline writer, I supposed), and whether I had seen the headline prior to publication (I had not). With all respect to the two agents, whose manner was courteous and professional, I feel that to interrogate me in this way about a published article on a matter of public concern, having nothing to do with my duties on the job, is in itself a substantial violation of my First Amendment rights, regardless of whether it also leads, as the statute provides, to a fine and dismissal from my job.

10. On or about January 23, 1991, one of the agents informed me by telephone that it had been determined that once I received the check from the newspaper, I would be in violation of the law. On February 5, 1991, when the check from the Washington *Post* arrived in the mail, I brought it to the Inspector General's office, and, in the presence of an agent, signed it over to a charity and mailed it. I was told at that time that the matter would shortly be referred to the Justice Department and my supervisors for possible further action. I have not heard anything about the matter since.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 1991.

/s/ Peter G. Crane

PETER G. CRANE

EXHIBIT 2

DECLARATION OF RICHARD DEUTSCH

1. I am an employee of the Voice of America (VOA), the international radio broadcast arm of the United States Information Agency (USIA), in Washington, D.C. I am currently business editor and a senior writer/correspondent on economics. Before becoming business editor in early 1989, I was a general reporter on business for VOA (1987-1989). Before that, I was a Washington-based general correspondent for VOA's Africa Service. My home address is 7306 Maple Avenue, Takoma Park, Maryland, 20912.

2. My current responsibilities at VOA include: tracking and analyzing major economic issues, trade and international business trends; interviewing experts in these fields; writing and reporting on-air about economic news; and writing a weekly 20-30 minute round-up of world business news. These reports are broadcast worldwide in English and in other languages on VOA.

3. As business editor I have played a central role in helping shape the VOA's response to the end of the Cold War and the economic changes gathering momentum around the world. In early 1990, I developed and helped launch a series on how the United States economy works.

4. I have worked for the VOA since 1979. During some periods of time between 1979 and 1987, I worked a 32-hour week (8 a.m. to 3 p.m. shift) and used the rest of the day, many evenings, and weekends to freelance and work for other organizations. I have worked at VOA full-time for the last 3 years.

5. Apart from my employment with VOA, I have served at different times as a Washington correspondent for *Africa Report* magazine, *Development Business* (a twice-monthly UN publication), and Monitor Radio, the

broadcast service of the *Christian Science Monitor*. On vacation, I have often done radio reports for Monitor Radio (for example, from the U.S. west coast and from Jamaica). I have worked part-time for Biznet television news, the cable service of the U.S. Chamber of Commerce, and as an *ad hoc* economics and editorial consultant to the World Bank. Taking a leave of absence from VOA, but still on the rolls as a federal employee, I served as a stringer in 1979 in West Africa for the *Christian Science Monitor*.

6. While an employee at the VOA, but on my own time, I have published about 50 articles for publications as diverse as the *New York Times*, the *Washington Post*, the *Christian Science Monitor*, *Dateline* (the employee magazine of American Express), *Development Business*, *City Paper*, *New Times* (Miami), and *Institutional Investor* magazine. These articles were written on my own time – lunch hours, weekends, vacation time, and so forth – and did not involve the use of government equipment or facilities.

7. A sampling of my more recently published articles includes: "Uruguay Round: Time Running Out," *Institutional Investor* (Sept. 1990); "IMF, World Bank Scramble to Keep Up in Eastern Europe," *Institutional Investor* (Sept. 1990); "Mr. Mitchell Goes to Washington," *Dateline Magazine* (Winter 1990); and "Emerging Equity Markets on the Rise," *Institutional Investor* (Sept. 1989).

8. VOA hired me in 1979 for expertise demonstrated by articles I had written, and assured me that I could continue to publish. I was, in fact, encouraged to publish because this might add prestige to the agency.

9. My outside work has also offered me exposure, flexibility, and the opportunity to build a stronger professional reputation. My annual income from all outside

work has never greatly exceeded ten thousand dollars per annum. Had I not been able to earn this money – as is the case under the new law – I would have produced only a few articles and would have devoted my extra time to other paying work.

10. In the first week of 1991, the managing editor of a national financial magazine asked me to write a lengthy feature article. But because of the honoraria ban I declined, losing one of the best fees I have ever been offered: $3,000. I later learned that even under the previous law I would have been limited to accepting $2,000, but that still would have been a substantial amount for me. I would have spent weekends and many evenings producing that article, perhaps one hundred hours. Even the most junior attorney usually does better on an hourly basis, but for me the payment seemed excellent, a reward for years of hard work building a reputation. Ten years ago, I spent countless hours producing articles for an average fee of one hundred dollars. Needless to say the compensation I receive is not only a financial incentive to continue writing, but also a psychological boost to know that my work is appreciated.

11. In February 1991 I declined another editor's request for several shorter pieces.

12. In my writing activities I have had two objectives: to analyze issues for the public and to supplement my income. By removing the economic impetus for writing – by making it an illegal economic endeavor – the honoraria ban acts as a powerful disincentive to exercising my First Amendment rights while remaining a federal employee.

13. Enforcement of the ban is entrusted to a bureaucracy neither trained nor necessarily interested in the preservation of individual rights. Federal guidelines

appear immediately capricious. Richard Werksman, the responsible ethics official in the general counsel's office at USIA (VOA's parent agency), advises me that receiving pay for working as a broadcast journalist on a free-lance basis is permissible – because, he says, reading a script over the air is like performing in a play. But receiving pay for working as a free-lance writer is not acceptable. In other words: if I write a piece and read it over the air, that's okay; but if the same piece appears in print, I'm subject to prosecution. Mr. Werksman says the agency has issued no written regulations specific to its own operations and employees. Instead, it will rely on its own interpretation of the federal guidelines – which are as vague as they are confused.

14. The new law apparently allows me to recover actual travel expenses and certain production-related expenses. Many of the expenses that a freelance writer incurs cannot be recovered as such, however, because they are not project-specific. For example, I have incurred a number of substantial capital expenses. I have purchased a personal computer and various forms of audio equipment, which I use primarily for my freelance writing and speaking activities. I spent several thousand dollars on this equipment with the expectation that I would be able to recover the expenses through my publishing and speaking activities over time. In addition, on many occasions I have travelled to conduct research, not knowing what, if anything, I would be able to publish in the end. Some research trips yield several articles and publication offers, others yield none. Such is the nature of freelance writing. By allowing me to recoup my expenses only if I can link them to a particular compensated piece of work, my unsuccessful research ventures become actual expenses that cannot be recovered. Since I have no way of knowing

whether a research venture will be successful or not, I pay a price overall for my writing activities.

15. It is simply impossible for writers like me to recover all our expenses. The law not only takes away the ability to make a profit, but it also penalizes us financially for engaging in speaking or writing activities. The impracticability of applying the law to writers like myself makes clear that the law does not serve any government interest since the activities that it curtails are clearly activities that pose no danger to the operation of the government.

16. USIA officials say they do not intend to enforce the honoraria ban as long as the issue remains before the Courts and under review in Congress. That, however, could be months or longer. Had the honoraria ban been on the books in 1979, I would not have joined the federal government. If it is not quickly overtuned or rescinded, I intend to resign as soon as I find an appropriate alternative. Because this law removes the financial reward for speaking and writing, it is an inducement not to do so for all but those employees who are independently wealthy.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 1991.

/s/ Richard Deutsch
RICHARD DEUTSCH

EXHIBIT 3

DECLARATION OF CHARLES E. FAGER

1. Since 1985 I have worked for the U.S. Postal Service as a Mailhandler. I am currently earning a salary at the Level 4, Postal Office scale. My home address is 4936 S. 25th Street, Arlington, Virginia 22206.

2. For the past twenty-five years I have been writing on a professional basis mostly on topics related to my church, the Society of Friends or Quakers. Since 1981 I have published a newsletter entitled *A Friendly Letter*. The publication of this newsletter has gained me some prominence in the Quaker community. Consequently, I frequently receive invitations to speak before Quaker groups. I am often offered some small payment for my efforts. It is not much, but enough to supplement my income in a way that makes a difference.

3. My lectures in the past include the following: in January 1991 I gave an address at the Woodbury Friends Meeting in Woodbury, New Jersey; in 1989 I was a major speaker at the Missouri Valley Friends Conference; in 1989 I was also Master of Ceremonies at a Friends Bible Conference; in 1985 I lectured on Martin Luther King at a Quaker Retirement Center; in 1984 I was the main speaker at the Southern Appalachian Yearly Meeting of Quakers; in 1982 I lectured on peace studies at the Earlham School of Religion; in 1980 I was a major speaker at the Consultation on Quaker Service in Richmond, Indiana. In addition, since 1984 I have conducted intensive Bible study workshops at the Friends General Conference.

4. In late 1990 I received an invitation from Guilford College, a Quaker institution in Greensboro, North Carolina, to speak to the Quaker community there on topics related to Quakerism. On March 5, 1991 after the dates and details for this engagement had been finalized, I

wrote to Eugene Hoge, U.S. Postal Service Director for Northern Virginia asking for advice as to whether the honorarium statute restricted this particular appearance. A copy of this letter is appended as Exhibit *A*. It was only the day before I left for North Carolina that I received an oral response (the written response from Charles D. Hawley, Assistance General Counsel, arrived after I returned from my trip – a copy of this letter is appended as Exhibit *B*) informing me of the details of the honorarium restriction. I was told that receipt of the $300 honorarium would constitute a violation of the statute, but I learned from other sources that the honorarium statute did not apply to this particular appearance because I had agreed to make it before the statute went into effect. I was able to receive the $300 that I had been promised in addition to my travel and lodging expenses.

5. I anticipate that I will receive future offers to speak. I believe having to ask my employer if payment for a particular activity is covered amounts to a screening procedure. This procedure is burdensome and I cannot imagine what legitimate government purpose it serves in the U.S. Postal Service. Furthermore, the restriction on payment acts as a disincentive to continue speaking.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed April 11, 1991

CHARLES E. FAGER

EXHIBIT 4

DECLARATION OF WILLIAM H. FEYER

1. I am employed by the United States Department of Labor, Wage and Hour Division, New York, New York. My home address is 2134 77th Street, Brooklyn, New York 11214.

2. I have been employed by the Department of Labor since 1976. At present, I am Regional Section 14 Specialist for Region II (New York, New Jersey, and the Caribbean), handling all matters relating to sheltered workshops and patient worker programs. Among my other duties, I handle applications for certification of sheltered workshops and patient worker programs in Region II. I coordinate the enforcement program, advise compliance officers and compliance specialists who conduct the investigations, and review their investigation files. I conduct in-service training for operators of sheltered workshops and patient worker programs. I also handle applications for student-learner certificates, which are issued to companies that wish to employ students at rates of pay below minimum wage in order to enable the student to acquire various job skills.

3. In addition to working for the Department of Labor, I am an ordained rabbi, known professionally by my Hebrew name, Zev-Hayyim Feyer. I was ordained in 1977. As a rabbi, I travel throughout the United States and Canada, delivering lectures, teaching classes, and leading seminars and workshops on Kabbalah (the Jewish mystical or metaphysical tradition), Self-esteem, Prosperity, Spiritual Stories, Comparative Religion, and other subjects. These programs are offered at churches, synagogues, and other centers throughout North America.

4. I am typically paid for presenting these programs by the sponsoring organizations. I conduct these programs

during my off-work hours – Sundays, holidays or annual leave. Otherwise, I take leave without pay.

5. In 1990, I presented programs in Alabama, Arizona, California, Colorado, Florida, Hawaii, Mississippi, New York, Ohio, Tennessee, Washington, the District of Columbia, and in the Canadian Province of Ontario.

6. At the time the complaint was filed in this case (December 1990), I had already scheduled an array of appearances for 1991 and early 1992. So far this year I have appeared in North Carolina and Washington, D.C. (February 1991), and in the New York area (March 1991). I plan to appear in New York again in June 1991, and in central Florida in July 1991. In addition, I am tentatively scheduled to appear in Birmingham, Alabama in June 1991, in the San Francisco bay area in December 1991, and at several churches and synagogues in Hawaii in January 1992. I will receive payment for most, but not all, of these programs.

7. I have continued to accept payment for those appearances that I had already scheduled prior to the honoraria ban taking effect on January 1, 1991. My understanding of the law, as interpreted by the Office of Government Ethics, is that commitments for appearances that were entered into prior to January 1, 1991, are exempted from the ban.

8. With respect to appearances that I have scheduled since the ban took effect, I intend to ask the sponsoring institutions to hold any payments (in excess of my actual expenses) in an escrow account until such time as the uncertainties regarding the law are clear.

9. At present, I am continuing with my rabbinic activities on the assumption that the absolute ban on honoraria will be struck down by the Court or amended by Congress. If the ban remains in effect, however, I will be

compelled to choose between my job with the federal government and my duties as a rabbi. This result directly and unnecessarily infringes upon my freedom of speech and religion.

10. This result also contravenes the Department of Labor's own long-standing policy – which was in effect when I took my job in 1976 – of actively encouraging its employees to engage in outside speaking and writing activities. (See 29 C.F.R § 0.735-11.) I feel as though an important condition of my employment with the government has been altered, without my input (much less my consent). The law banning honoraria creates a real disincentive to continue speaking for those who cannot afford to give up their government jobs. It also creates a real disincentive to work for the federal government for those who wish to continue to speak.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 1991.

/s/ William H. Feyer

WILLIAM H. FEYER

EXHIBIT 5

AFFIDAVIT OF THOMAS C. FISHELL

1. I am employed by the Internal Revenue Service as a GS-8 tax examining assistant at its District Office in Dallas, Texas. I have worked for the IRS since January 9, 1984. I am currently chief steward and executive vice president for National Treasury Employees Union Chapter 46 in Dallas.

2. I am also a self-employed ordained and licensed minister of the Southern Baptist Convention. I was licensed in 1980 and ordained in 1981. I have the right to perform weddings and funerals and to deliver sermons in the Baptist Church.

3. I deliver sermons at various Baptist churches in the area as requested. I also conduct funerals and weddings. I speak at special weekday meetings at churches on religious topics or on subjects relating to church administrative matters. These include church staff training sessions on subjects such as use of computer software and the running of Sunday School programs. Occasionally, I travel to Michigan, my home state, to conduct services or a wedding or funeral. I receive fees for these religious duties.

4. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. I believe that this will cover the fees that I receive for religious services, weddings, funerals, and speaking engagements.

5. I have already committed myself to speak or conduct weddings at various dates after January 1, 1991. I have not decided whether I would break these commitments if I were not able to accept fees for them.

6. I will cease accepting most invitations and severely curtail my speaking and most other activities as minister if the ban on acceptance of honoraria remains in effect. I cannot afford to perform these activities without recompense.

7. The likelihood that the ban will remain in effect has made me reluctant to accept engagements now for dates after January 1, 1991. Since I learned of the ban, I have only tentatively accepted some engagements and have postponed making commitments as to other engagements. This uncertainty as to whether I will be able to perform my religious duties is imposing a hardship on me, because I need to know what my schedule will be. It will also impose a hardship on couples who will want me to officiate at their wedding, because I will have to tell them that I do not [know] whether I will be able to perform the ceremony.

8. In about 1984, I received permission from the IRS to engage in my activities as minister. I estimate my 1990 net income from these activities to be about $1000.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12-3-90.

/s/ Thomas C. Fishell

THOMAS C. FISHELL

EXHIBIT 6

SUPPLEMENTARY AFFIDAVIT OF THOMAS FISHELL

1. I am an individual plaintiff in this litigation, and have filed a previous affidavit dated December 3, 1990. I am an Internal Revenue Service employee and an ordained part-time minister.

2. In my capacity as a minister, I am called upon to give paid guest sermons during worship services conducted by other ministers, to perform weddings and funerals for compensation, and to make other compensated speeches to church groups on religious topics and church administrative subjects.

3. In the period since January 1, 1991, the effective date of the provision of the Ethics Reform Act which prohibits the acceptance of compensation for certain categories of writing, speaking and public appearances, I have been forced to curtail my First Amendment activities. I have cancelled a guest sermon because I could not accept compensation under the terms of the Ethics Reform Act and implementing regulations. Because I have made it known that I am unavailable for weddings and funerals, I am no longer receiving requests to perform them. I expect to continue declining requests to perform these services as long as the ban on compensated speech remains in effect.

4. I believe that I am entitled to compensation for the time and effort that I spend preparing and delivering sermons, conducting religious services, and giving speeches. The expenses associated with my work as a clergyman do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable

under the Ethics Reform Act. For example, I have already spent four years pursuing my theological education, and anticipate spending another year or two doing so, at considerable financial expense. I have invested approximately $2000 in word processing equipment. I also maintain an extensive library of religious commentaries, annotated biblical texts, multi-volume encyclopedic sets, and related scholarly materials, which are necessary research materials as I prepare my sermons. I estimate that I have spent $2000 in collecting these materials, including more than $400 on books I would not have bought but for my work as a minister. I must continually add to these materials, particularly cumulative encyclopedic texts, as new texts and supplements become available. The Ethics Reform Act would force me to absorb these capital costs permanently, and forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

5. While the inability to defray my capital investment in my part-time work as a clergyman is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially reduced by the ban on compensated expression. The time I spend preparing and delivering religious services and speeches could readily be invested in a profitable activity, such as working overtime at the IRS. Because I would be entitled to accept payment for these activities in the normal course of affairs, and because the law imposes economic disadvantages on me for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities, as surely as it would if I had been taxed on the income produced through my work.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Thomas Fishell

THOMAS FISHELL

Date: 4/5/91

EXHIBIT 7

AFFIDAVIT OF CHARLES GIUNTA

1. I am employed by the United States Customs Service as a Customs Inspector in El Paso, Texas. I am a member of the National Treasury Employees Union and the President of NTEU District 116, which consists of 33 NTEU chapters west of the Mississippi River. I am also a member, Chief Steward, and former President of NTEU Chapter 143, representing Customs employees in El Paso. A President of District 16 and Chief Steward at Customs in El Paso, I continue to be responsible for overseeing and directing the operations of Chapter 143.

2. The function of NTEU chapters is to provide representation and services to bargaining unit members at the local level. These activities include collective bargaining, grievance arbitration, and filing unfair labor practice complaints. Such activities also include organizing concerted action by bargaining unit employees, such as demonstrations, letter-writing campaigns, and lobbying. Further, NTEU chapters perform the important function of making employees aware of their legal rights, notifying them of important opportunities and deadlines, and keeping them abreast of union activities on the local and national levels. NTEU chapters also hold elections to select chapter officers and representatives to national NTEU activities, and hold meetings to determine future activities and discuss the chapter's position with regard to actions taken by management.

3. To perform the functions described in paragraph 2 adequately, my NTEU chapter must have a newsletter to

communicate with bargaining unit employees. Such a newsletter serves as the union organ, alerting bargaining unit members to union and management activities, commenting on political issues affecting employees, notifying them of important dates and deadlines, announcing union meetings and elections, and describing employee rights and opportunities for advancement. The newsletter is also a means for Chapter 143 to inform employees of the official position taken by the chapter with respect to matters of concern to bargaining unit members.

4. During my tenure as President of NTEU Chapter 143 and NTEU Region 16, Chapter 143 has published a monthly newsletter. At first, Chapter 143 attempted to assemble its newsletter by soliciting voluntary contributions of articles and information from chapter members. Unfortunately, because Customs workers in our chapters usually work long shifts and have little spare time or energy to devote to extracurricular activities, and because some employees feared management retaliation, it was not always possible to find authors to cover all the stories that needed to be included in the newsletter. In addition, assigned stories were often turned in late, delaying publication of the newsletter and frequently making other time-sensitive announcements in the newsletter "stale." Finally, the quality of the writing that resulted from this voluntary contribution system was often inconsistent. As a result of this inadequate level of voluntary participation, the newsletter failed to publish regularly and was dropped altogether on several occasions, most recently about a year ago.

5. Shortly thereafter, Chapter 143 launched renewed efforts to produce a newsletter. To avoid the difficulties associated with publication of the earlier newsletter, Chapter 143 arranged with a Customs employee, who was also a talented writer, to write the newsletter. He typically devoted ten to twenty hours each month to writing articles for the newsletter, and was compensated at the flat rate of $100 per month. While there was no contract between Chapter 143 and individual employee, we paid him the flat fee for each month he wrote the newsletter. Other employees were still welcome to submit contributions to the newsletter. However, by relying on the paid services of one individual, we were able to assure the regular, timely publication of a comprehensive, well-written, and well-informed newsletter for use by the chapter and its members.

6. The individual we paid to write our newsletter was not a salaried employee of the chapter and did not have a continuing contract with it. He stood as an independent contractor in relation to Chapter 143, and he was under no obligation to write the newsletter in any successive month.

7. Chapter 143 recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. We believe the prohibition prevents federal employees from accepting money for writing newsletters such as our chapter's publication.

8. When we advised our newsletter writer of the new law, he declined to continue writing the newsletter without compensation. Personally, and with the help of other chapter officers, I engaged in an extensive search, including personal requests, for Customs employees who

would be willing to write the newsletter on a regular basis without compensation.

9. When we were searching for a new writer, we considered it essential that he or she be a Customs employee and a skilled writer. There were several reasons why this was important. First, it was necessary to retain an individual who would be intimately familiar with technical issues involving Customs employees and the particular problems they confront. Chapter officers and members do not have time to explain these details to non-Customs employees unfamiliar with their complexities. Second, Chapter 143 has a limited budget, and was unable to afford the rate of pay necessary to retain an outside writer for its newsletter. Finally, we considered it essential for the credibility of the newsletter as a union organ and as the voice of the workers that it be seen as the product of Customs employees' time and effort, not the product of a "hireling" from outside the Customs Service. We were unable to find any qualified writer, employed by Customs, who was willing to write the newsletter without compensation. We also found no qualified individual outside of Customs who was willing to write the newsletter for a fee that was within our chapter's budgetary constraints. Because we were unsuccessful in this search, the Chapter 143 newsletter has not been published since the December 1990 issue.

10. Chapter 143 has been seriously harmed by the discontinuation of its newsletter. With the loss of its publication, the chapter has effectively been deprived of its "voice." Communications with workers have become quite laborious, for they are now entirely dependent on the frequent circulation of reproduced memoranda and notices. They have also become considerably less effective.

I therefore believe that the honoraria ban constitutes a serious burden on the speech of the chapter, as well as that of individuals who would otherwise be paid to write on the chapter's behalf.

11. If NTEU or some other plaintiff is successful in obtaining declaratory and injunctive relief prohibiting the government from enforcing this prohibition on honoraria, Chapter 143 will immediately resume the practice of paying Customs employees for writing its newsletter. If such relief is unavailable, it appears that we will be unable to recruit regular writers for this publication.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Charles Giunta

CHARLES GIUNTA

Date: 4/9/91

EXHIBIT 8

DECLARATION OF ROBERT A. GORDON

1. I am an Aerospace Engineer and have been employed in such capacity at the Goddard Space Flight Center in Greenbelt, Maryland for the last twenty-two years. I am currently earning a salary at the GS-13 level. My home address is 1667 Webster St., N.E. Washington, D.C. 20017.

2. For the past five years I have given various lectures on subjects related to Black History, which is an area of great interest to me.

3. In January of 1991 I received an invitation by the Maryland Institute of Art to give two lectures on Black History. I also have received recent invitations to give lectures on the same general subject at the University of Maryland and at Savannah State College a unit of the University System of Georgia. My fee is normally $100 per lecture.

4. On February 14, 1991 I sent a memorandum to Lawrence F. Watson, Chief Counsel at NASA, requesting an interpretation of the Ethics Reform Act of 1989 to see if I could receive payment for my speaking activities. A copy of this memorandum is appended as Exhibit *A*.

5. On February 15, 1991 I received a response from Mr. Watson informing me that any payment I received above "actual and necessary travel expenses" would be considered to be in violation of the statute. A copy of this response is appended as Exhibit *B*.

6. On March 6, 1991 I gave a lecture on Black Seminole Warriors and on March 13, 1991 I gave a lecture entitled "The Glory and The Shame" which was a critique of the movie "Glory." Both of these lectures were delivered at the Maryland Institute of Art and I was promised payment of $100 for each of them.

7. I asked Professor Lenora Foerstel of the Maryland Institute of Art to hold my payment checks until this litigation is decided. Professor Foerstel informed me that the Maryland Institute of Art could not hold the checks for me. A copy of this response is appended as Exhibit *C*.

8. On April 6, 1991, I received a check for $200 by mail from the Maryland Institute of Art in payment for the lectures.

9. On April 10, 1991 I hand delivered a request to Mr. Watson at NASA to hold the check in his capacity as Chief Counsel, until this litigation is resolved. A copy of this letter is appended as Exhibit *D*.

10. On April 10, 1991 by "Telemail", Mr. Watson informed me that his office could not accommodate my request. A copy of the Telemail message is appended as Exhibit *E*.

11. At about noon of April 10, 1991 the check was deposted in a Citizens Bank of Maryland "ESCROW FOR LECTURES" account. A copy of the account is appended as Exhibit *F*. Mr. Watson's Telemail response seemed to indicate that depositing the check in the escrow account would still be a violation of the statute. However, I made the deposit in a good faith reliance on the opinion of the Court of Appeal in this litigation, which endorsed the escrow account approach.

12. I understand that under the law I am entitled to recover "actual and necessary travel expenses". Although Mr. Watson did not so inform me in his February 15 memorandum, I now understand through my attorney that I can also recover expenses in the nature of typing, editing and reproduction costs. I have not saved receipts for these kinds of expenses in the past and for the most part it is simply burdensome to do so. In the future I will have to save receipts of photocopies and the like. I also

plan to prepare some video presentations, but I do not know if the cost of the tapes and the editing can be included as an expense.

13. In any event, the expenses outlined above only constitute part of the varied expenses that I incur in preparation for my speaking activities. For example, in preparing for my critique of the movie "Glory," I went to Boston to visit the "54th Massachusetts/Col. Shaw" memorial and to research some historical documents. Perhaps this could be characterized as a "necessary travel expense", but I plan to give more than one lecture on this subject. How am I to apportion the amount spent on my trip to Boston? Basically, it is often impossible to tie research expenses to a specific lecture. Normally the research for a speech is conducted in considerable advance before the speech is given.

14. Given the subject matter of my lectures I often have to pull together non-traditional research sources. This requires a great expenditure of time and effort. The expenditure of this time and effort at the expense of other activities with my family or otherwise is an expense that I feel should be compensated if I find an audience that is willing to pay to listen to the fruits of my research. I feel that I am making a contribution by researching areas that have in the past been ignored and offering the results of my research to others. (Note the copy of the response of Dr. Hanes Walton, Jr. author of "Invisible Politics" – Black Political Behavior, appended as Exhibit *G*). The new law disallowing compensation for my efforts is a disincentive to continue engaging in these activities. My expenses are often intangible or difficult to tie to a particular speech activity, so this law leaves me with a non-compensated loss for speaking.

15. I have not reduced my speaking activities to date,

but I am working on the expectation that the law will soon be declared unconstitutional or changed by Congress. If the inability to receive payment for my speech activities becomes a permanent situation I will have to significantly reduce my activities. As an example, I would like to visit the Seminole reservation in Oklahoma to continue my research on Seminoles, but I cannot pay for this out of the money on which my family depends. I need to be able to save some money from my speaking activities to be able to fund this research trip. Under the current law I will never be able to pay for this trip, thus I will not be able to speak to others about it. In a similar fashion the absence of money from which to fund other research activities will significantly reduce my speaking activities.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed April 11, 1991

Robert A. Gordon

ROBERT A. GORDON

EXHIBIT 8

AFFIDAVIT OF JAN ADAMS GRANT

1. I am employed by the Internal Revenue Service as a GS-7, Step 4 tax examining assistant at Ogden Service Center. I was placed on seasonal non-duty, non-pay status as of October 23, 1990, but I expect to resume duty status in January 1991. This is my first seasonal furlough in almost two years. I have been employed by the IRS for five years and am a career-status employee. I am a member of the National Treasury Employees Union.

2. I have a master's degree in geo-physics from Utah State University.

3. In my non-work time, I write non-fictional articles for publication in magazines. I have published articles in such magazines as *Woman's Day*, *Sierra*, and *Camping Today*. These articles concern such subjects as outdoor activities and environmental issues. One article that I am currently proposing to write concerns the reintroduction of wolves into Yellowstone National Park.

4. My normal practice is to prepare a "query letter" proposing an idea for an article. I submit the query letter to a magazine publisher. If the publisher is interested, he will write me a letter stipulating the payment terms, the magazine and issue in which the article will appear, and the date by which the article is to be submitted. After I reply, accepting the terms of the letter, we have a binding agreement. I am usually paid per word, upon submission of the article and acceptance by the publisher. The publisher refuses to accept the article only if it fails to meet his editorial standards or if the viewpoint of the article

does not fit the magazine's philosophy. This is very rare; I have never had a submitted article rejected.

5. I currently have four query letters outstanding, waiting response from a publisher. If one or more is accepted, the article(s) would appear after January 1, 1991. Publishers usually expect delivery of an article from one to six months after agreement is reached on the writing of the article.

6. I have also written a humor article entitled "Greenhorn Backpacking," which I have submitted to *Camping Today*. I am waiting to hear if the magazine will accept the article.

7. I am writing a book of fiction, with some factual basis, that I have tentatively titled *The Green Shovel*. I have submitted three chapters to a publisher, Morrow & Son, and am waiting for their response. I am anxious to publish as many articles as possible because I believe that it is easier for an author to sell a first book to a publisher if he or she has published widely in magazines.

8. I also deliver speeches to local church groups on earthquake preparedness. I am currently accepting speaking engagements for dates following January 1, 1991.

9. I receive income from my articles and speeches. I estimate that I will receive approximately $3000 from my writing and speeches in 1990. I have received permission from the IRS to engage in this activity because there is no possibility of conflict with my duties for the IRS.

10. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1,

1991. I believe that this prohibition will cover the money that I receive for my articles and speeches.

11. I would not continue to write articles and deliver speeches if I were not able to accept money for those activities. I cannot afford to write if I cannot even be reimbursed for the expenses that I incur in connection with researching and writing my articles. If forced to choose between my free-lance article writing and public speaking career and my job with the IRS, I would have to give up the former. I do not yet earn sufficient income from writing to permit me to resign my job with the IRS and write full-time.

12. If I were compelled to end my writing and speaking career, I would lose the intellectual pleasure, as well as the additional income, that I receive from those activities. I also believe that I would hurt my prospects of securing a publisher for the book I am currently writing.

13. The existence of this law has already affected my writing career. I am not submitting new query letters because I do not know whether I will be able to fulfill my part of the agreement. I certainly do not want to breach an agreement with a publisher. Therefore, if a publisher responds favorably to one of my outstanding query letters, I will have to tell that publisher that I am unable to write the article. Publishers do not tolerate delay and will not permit me to postpone writing the article.

14. Because I expect the prohibition on honoraria to go into effect on January 1, 1991, and that I will no longer be able to enter contracts to write articles after that date, I have stopped researching new ideas for articles. This enforced period of inactivity is particularly difficult for me

because I had planned to devote my temporary furlough period to my writing. I believe that this period of inactivity will have long-term harmful effects on my writing career. Ideas that I have developed and researched will no longer be timely and therefore will not be acceptable to publishers, who look for articles that are topical. Because researching ideas, developing query letters, submitting ideas to publishers, awaiting their agreement, and writing the articles is such a lengthy process, I will have a significant gap in my schedule that will affect me for many months after enforcement of this statute is enjoined or the statute is amended by Congress. The longer the time until relief is provided, the longer the gap in my schedule and the more pervasive and lingering its effects, of course.

15. If NTEU or some other plaintiff is successful in obtaining a preliminary injunction prohibiting the government from enforcing this prohibition on honoraria, I will immediately submit query letters with proposed ideas for articles and resume my research. For example, if the injunction is granted, I would be able to travel to Yellowstone National Park on January 14, 1991, as I had originally planned, to research a proposed article on the reintroduction of wolves there. I also expect to enter into agreements to publish my articles while the preliminary injunction is in effect. I would continue to work on future articles at my regular pace because I would expect the injunction to be made permanent. If the injunction is not granted, I will not resume my research and writing; there would be no point in traveling to Yellowstone and investing the money in research if I cannot be sure I would at least recoup my expenses.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12-13-90

/s/ Jan Adams Grant

JAN ADAMS GRANT

EXHIBIT 11

DECLARATION OF JUDITH L. HANNA

1. I am an Education Program Specialist for the United States Department of Education ("ED") in Washington, D.C. I hold a Ph.D in anthropology from Columbia University, an M.A. in political science from Michigan State University, and a B.A. in political science from UCLA. My home address is 8520 Thornden Terrace, Bethesda, Maryland, 20817.

2. I have been employed by the ED since September 25, 1989. As an Education Program Specialist, I write on issues involving national education goals. Specifically, I am currently working on two book projects that I proposed to the ED in November of 1989: *Dropout Prevention, Literacy, and the Performing and Visual Arts*, and *Tough Cases: School Outreach for At-Risk Youth*. As their titles imply, these book projects are concerned with the national goals of dropout prevention and academic improvement. As a result of my work in conjunction with these projects, I have been invited to lecture in Minnesota, Colorado, and North Carolina before University faculty, administrators, school superintendents, and representatives of arts and community organizations. If I had not been speaking on my ED work, I would have received a $500 honoraria in addition to travel and per diem expenses.

3. Before joining the ED in 1989, I was a high school teacher, university professor, researcher and consultant for in-service programs for teachers and administrators. Since 1965, I have been invited by various individuals and groups to speak, write and consult on matters about which I have developed expertise through my education, research, and experience. To date, I have written and had published six books and more than 75 articles. I have also written many scholarly papers, presented lectures at more than 24 universities, and served as a consultant/reviewer

of grant proposals, publications, and foundations. I have received honoraria in amounts ranging from $75 to $650 for my lectures.

4. Outside of my ED work and using my own resources, I frequently engage in research, writing, and consulting activities for remuneration. Current ED rules permit me to work 10 hours per week for pay. I have received ED approval for my consulting activities and for my outside writing in the areas of anthropology, ethnomusicology, dance ethnology, racial tension on college campuses, and gender.

5. As stated above, I have written six books. The most recent include: *Life, Death, and the Women's War: Africa Ubakala Igbo Dance-Plays* (under review, recommended for publication); *Dance and Stress: Resistance, Reduction, and Euphoria* (AMS Press 1988); *Disruptive School Behavior: Class, Race and Culture* (Holmes & Meier 1988); and *Dance, Sex, and Gender: Signs of Identity, Dominance, Defiance, and Desire* (University of Chicago Press 1988).

6. In the past two years (1989-1990) I have also published 11 scholarly or popular articles for which I received compensation. ED approved my writing of such articles, which appeared in journals and newspapers as diverse as *Update USA* (1989), *Dance Teacher Now* (1989, 1990), and *The Washington Post* (1989). In addition, an article that I wrote comparing Nigerian and modern dance was published in an edited compilation of articles entitled *Women and Social Protest* (Oxford University Press 1990), and I contributed articles to the *Grove/Norton Handbook of Ethnomusicology* (1991), *Dance, Gender and Culture* (1991), and *International Encyclopedia of Dance* (1991).

7. In 1991 I expect to receive payment for an article

that will be published as a chapter in the book *Popular Music and Communication* (1991).

8. If an article I write is "project-specific" or directly related to my work for the ED, I do not accept any compensation for its publication. This is in accordance with current ethics regulations, and is unrelated to the restrictions imposed by the honoraria ban.

9. In the past, writing and publishing articles has always been an integral part of my work. Articles related to the subjects of my books can be published in a relatively short period of time, and they often elicit helpful feedback that allows me to improve an upcoming book and to publicize it as well. Articles published after a book is released stimulate the readership, pique the curiosity of those who might not otherwise buy the book, and convey my ideas in condensed form to specific readers who may only read the book material in that form.

10. The honoraria ban has discouraged me from writing and publishing articles, however. Since the ban took effect on January 1, 1991, I have undertaken *no* initiatives to publish any new articles. In addition, I recently turned down an opportunity to co-author an article. I would have readily accepted such an opportunity in the past.

11. The fact that I can no longer get paid for writing articles is absolutely a disincentive for me. I would rather devote my time and energies to other projects for which I can still receive compensation, such as the writing of books. It makes little sense that the law now permits me to receive royalties from books, while it does not allow me to receive payment for articles written on the same topics.

12. I have been informed that the law banning honoraria would allow me to recover "actual and necessary travel expenses" and "actual expenses in the nature of typing, editing and reproduction costs." These

exceptions do not remove the harmful effects of the law. Allowing the recovery of "expenses" does not account for the value of my time, or the fact that I could have spent it pursuing income-earning activities. In addition, not all "expenses" involved in writing an article are in fact recoverable. As a minor example, it would be quite difficult to attribute with any accuracy what percentage of my computer ribbon was used to produce any particular article. Moreover, some articles take years to write. It would be nearly impossible to calculate with any accuracy the "actual expenses" involved in such an effort. In any case, the notion that I would be required to save my receipts and document in detail my production-related expenses in order to break even (at best) is itself a disincentive to any such effort. I am much more inclined to engage in activities that do not necessitate jumping through such hoops.

13. Under the current ban on honoraria, I also will not accept any speaking engagements. The preparatory time and travel time entailed thereby are better spent on income-producing efforts, such as writing books.

14. The ban on honoraria causes unnecessary injury to me as a federal employee and to those whom my writing and speaking assists. I joined the ED at a time of strong interest in educational reform, with the desire to apply my knowledge and expertise at the national level. My mentor, Margaret Mead, encouraged her students to pursue public service; scholars should not simply address one another, she argued. ED policy does not discourage outside scholarly activities; some supervisors encourage it. However, the ban on honoraria discourages scholars like me from speaking and publishing as extensively as in the past, thereby detracting from the intellectual capital of the country.

15. The honoraria ban also causes me harm that is not

directly financial. A scholar's professional reputation depends on continued productivity. I am less productive now than before the law took effect. It is as though I am being penalized just for being a federal employee.

16. I did not expect to lose my First Amendment rights just by entering government service. Nor did I expect that my joining the government would infringe my right to share my knowledge with those who ask, or reach out to those who need or request my assistance. I have received public education at some of the finest universities. In addition, I have received public education and foundation support for my research. Consequently, I believe I should have the freedom to use this experience to contribute to knowledge, both within and without the scope of my federal employment.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 10, 1991.

/s/ Judith Lynne Hanna
JUDITH LYNNE HANNA

EXHIBIT 12

DECLARATION OF DR. GEORGE J. JACKSON

1. I am a microbiologist for the Food and Drug Administration, United States Department of Health and Human Services. I hold a Ph.D. in microbiology from the University of Chicago. I have been employed at the FDA since 1972. My government grade level is GS-15. My address is 1435 Fourth Street, S.W., Washington, D.C., 20024.

2. My secondary profession is that of a dance writer. My interest in dance goes back to my childhood when I was an ice figure skater. I began to write about dance – reviews of performances and historical essays – in college, was first published by my college newspaper in 1951, and was soon asked to contribute pieces to professional publications. I have continued to do so. Currently, the two principal publications for which I write are the *Washington Post* and *Dance Magazine* (New York). I have written regularly for the *Post* since 1978, and for *Dance Magazine* since 1985. On occasion, I write or edit for other dance publications, lecture on dance for universities and the Kennedy Center, and do radio and television broadcasts on dance.

3. Some of my more recent articles in the *Washington Post* include: "Miami City Ballet" (April 8, 1991); Dorothy Hamill and the Next Ice Age" (April 4, 1991); "Variety Without the Spice" (Dec. 11, 1990); "Ailey Troupe's Class Act" (Nov. 5, 1990); "Tableaux of Russian Ballet" (Sept. 8, 1990); and "Men on a Pedestal: Miami's Male Dancers Star in Balanchine" (Aug. 11, 1990).

4. I write dance articles as frequently as two per week. Although the money I receive is not insignificant, more important than the money is that I enjoy dance immensely. In addition, keeping the tight deadlines of a paper like the *Post* or lecturing on this topic provides wonderful training and discipline that helps me substantially in the writing and speaking aspects of my FDA assignments as a microbiologist.

5. Before the honorarium statute went into effect, I was paid for my articles. I was also paid for some, though not all, of my speaking appearances. Relative to my government salary, I did not earn a great deal of money from this endeavor—no more than $3,000 annually.

6. I very much want to continue to write and lecture about dance. In fact, I would probably continue to do so even without pay. However, the Washington *Post* informed me at the end of last year that they could not accept my articles for publication if they were simply "donated." Moreover, the Dance Critics Association, of which I am a current member and past President, strongly discourages its members to write for no pay. As a result of the honorarium ban I did not write for a period of three weeks, missing the opportunity to publish at least three or four articles.

7. On January 24, 1991 I was told by Allan M. Kriegsman, Chief Dance Critic of the *Post,* that I could resume writing for the newspaper and I would not get paid at the time. Mr. Kriegsman made it clear that this was only a temporary decision and that it was based on the possibility of a change in the law.

8. Because the *Post*'s decision is temporary, I am still uncertain as to my future relationship with the newspaper if the honoraria ban is not suspended by this Court or changed by Congress.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 1991.

/s/ Dr. George J. Jackson

DR. GEORGE J. JACKSON

EXHIBIT 13

AFFIDAVIT OF SHARON KENNEDY

1. I am employed by the Department of Health and Human Services as a GS-11 Equal Opportunity Specialist in Washington, D.C. I have worked for HHS since 1978. I am a member of the National Treasury Employees Union.

2. In my spare time I engage in freelance writing in a variety of contexts. I write reviews of art shows, musical performances, stage plays and dinner theatre for local and city newspapers, including the Washington Post, Washington Times, Manassas Journal, Prince Georges Journal and Montgomery Sentinel. Frequently I write two reviews a week. I engage in this activity because I consider myself a serious writer, and I find that this form of writing enables me to cultivate and enhance my skills in a way that work-associated writing cannot.

3. I also write public relations copy and press releases for local businesses, which are published in local and regional newspapers. I engage in this enterprise as a small business, and when I file my tax returns, I report income and avail myself of all tax advantages associated with my freelance writing.

4. I am compensated for my writing in several different ways. For my critical reviews of art, music and theatre, I ordinarily receive complimentary admission for myself and a guest. If I am doing a dinner theatre review, I also receive complimentary dinner for myself and a guest. In addition, I am often paid a fee by my publisher for art or performance reviews submitted. Further, I receive fees for writing public relations copy for small businesses for local publication. In all, I would estimate that I receive $1500.00 annually in fees and another $1500.00 in free theatre admission and meals in exchange for my writing. I have also received numerous awards for my writing.

5. My writing is also important to my primary career activities. I have applied for positions with the Voice of America and with the Equal Employment Opportunity Commission that entail professional writing. I am informed that because of my outside writing activities, I may be considered for positions at GS-13 instead of my current level, GS-11. This would be very advantageous to me financially.

6. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. I believe that this will cover the compensation I receive for my various writing activities.

7. Aside from the outlay of personal time and effort, my writing entails considerable financial outlay. For example, in order to cultivate clients for my public relations writing, I must maintain memberships in the Prince Georges County Chamber of Commerce and the Prince Georges County Public Relations Association. My annual fees for these two memberships are $250.00 and $30.00, respectively. Of course, if NTEU or another plaintiff is unable to obtain in order enjoining the government from enforcing the honoraria provision of the Ethics Reform Act, I will be unable to accept complimentary admission to the artistic and theatrical events that I cover, and any continuation of my writing would entail that additional expense.

8. I cannot afford to pay admission to all the artistic and theatrical events I cover or to continue paying associational membership fees if I cannot recover compensation for my writing. Therefore, if the honoraria provision of the Ethics Reform Act is allowed to take effect, I will be forced to stop writing. Otherwise, I plan to continue writ-

ing and anticipate several commitments in January 1991.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12/27/90

/s/ Sharon Kennedy
SHARON KENNEDY

EXHIBIT 14

SUPPLEMENTARY AFFIDAVIT OF SHARON KENNEDY

1. I am an individual plaintiff in this litigation, and have filed a previous affidavit dated December 27, 1990. I am an employee of the Department of Health and Human Services, and I also operate a home public relations business. This entails writing press releases, promotional copy, newsletters, resume portfolios for performing artists, and theatrical and artistic reviews.

2. Business clients and publishers always pay for my professional writing. Because of widespread professional norms in the writing, public relations and publishing industry, many of the publications that print my work have a policy of publishing only articles for which they have paid an honorarium. I am not employed by any of the publishers that pay me for my writing. I accept contractual arrangements with business clients for my writing services.

3. In the period since January 1, 1991, the effective date of the provision of the Ethics Reform Act which prohibits the acceptance of compensation for certain categories of writing, speaking and public appearances, I ceased accepting compensation for my writing and speaking. I have continued to write, in order to protect my credentials, with a view to resuming my compensated writing if and when the law is struck down. If the law is not struck down, and I can no longer accept compensation for my writing under the terms of the Ethics Reform Act and implementing regulations, I will be forced to close my

professional writing business and research possibilities to take up some more profitable activity.

4. As a professional writer, I believe that I am entitled to compensation for the time and effort I spend in researching and preparing my written work. The expenses associated with this activity do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable under the Ethics Reform Act. For example, I have made extensive investments in word processing equipment and training in furtherance of my writing business. In 1988, I invested $1912 in IBM computer equipment and $434 in furniture for my home office. In 1989, I spent $889 on an IBM printer. In 1990, I spent an additional $1915 on computer hardware and software. This year, I have already invested an additional $1700 in a replacement computer. I have also spent $598 (and considerable personal time) on noncredit coursework to acquire and sharpen my skills in word processing and computer applications, and expect to spend an additional $400 to $500 for continuing coursework. In addition, I have invested approximately $1500 since 1988 in maintaining a home library of books and journals related to the subject matter and applications of my writing, including books on art and theatre, public relations materials, and writers' market publications. I anticipate additional annual expenditures of $200 to $300 maintaining such a library. The Ethics Reform Act would force me to absorb these capital costs permanently, and to forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

5. The compensation I receive for writing has also helped subsidize the improvement of skills necessary for my work as a writer, which have, in turn, expanded my opportunities for career improvement at HHS. For example, through writing as a business activity, I have learned the difference between the accepted standard of business writing and government writing styles. Further, the courses I have taken in word processing and computer applications have made me eligible for a career change to computer support specialist positions, which could result in a two-grade increase in pay. I have also received a cash award from HHS for expanding use of software applications for the agency. My home business as a professional writer has enabled me to set aside the time I need to develop the skills necessary for this.

6. While the inability to defray my capital investment in my professional writing activities is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially reduced by the ban on compensated expression. The time I spend preparing written work could readily be invested in a profitable activity, such as working overtime at HHS. Because I would be entitled to accept payment for these activities if the government had not determined to regulate this field, and because the law imposes economic disadvantages on me for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities. I have often been struck by the legal and social structures, and the many layers of review and revision, that have prevented me from speaking my mind in my government

workplace, where my writing is ultimately the property of my employer. By contrast, I have always enjoyed the flexibility to say what I think in my professional writing, and I have derived great pleasure from the recognition this has brought me in the form of professional awards and monetary compensation. I am offended that the government is now reaching out to stifle my expressive activity outside the workplace.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 3/25/91

/s/ Sharon Kennedy

SHARON KENNEDY

EXHIBIT 15

DECLARATION OF EDUARD MARK

1. I received my Ph.D in American History from the University of Connecticut in 1978. I have been employed by the Department of the Air Force as a historian since August 1981. My chief responsibility has been to perform historical research on subjects of interest to the Chief of Staff, United States Air Force, and the Air Staff. In the course of my work for the Air Force I have written many specialized studies and two books. Various particulars regarding my education and professional accomplishments are stated in my curriculum vitae; a copy is appended as Exhibit *A*. My home address is 623 South Carolina Avenue, S.E., Washington, D.C. 20003.

2. Throughout the period of my employment with the federal government I have independently written on the history of Soviet-American relations, ever careful to abide by the guidelines on honorariums stated in Paragraph 13, Section A of Air Force Regulation 30-30 (26 May 1989), a copy of which is appended as Exhibit *B*. I have published in scholarly journals, contributed to collections of essays, reviewed books, and written the guide to a microfilm edition of State Department documents relating to World War II. For some of these activities I have received payment. I wish to continue to do so.

3. The financial rewards for historical scholarship are slight. Most historical journals pay nothing for articles, and the sums received for contributions to encyclopedias or collections of essays are customarily low. Historians employed by the federal government have nonetheless had the expectation that they, like their academic colleagues, would occasionally be compensated for their labors outside the office. The psychological gratification that some scholars receive from even token remuneration is doubtless great. But these occasional payments have also

had practical significance. Virtually all scholars, within government and without, deduct their research expenses from their income taxes. One means of doing so commonly employed by scholars who do not hold academic positions is to treat their independent scholarship as a business, and to do so it is necessary to show a nominal net "profit" two years in five. This is an important consideration because a scholar's expenses are often considerable. The costs of only two weeks working in a major repository of manuscripts, for example, can easily reach two thousand dollars when all costs—travel, room, board and photoduplication—are considerable. It is therefore necessary to receive even modest amounts of income from these activities in order to deduct these expenses.

4. I now understand that under the current law I am allowed to recover "actual and necessary travel expenses" plus expenses in the nature of "typing, editing and reproduction costs." This allowance, however, still does not permit me to recover all the expenses I bear in pursuing my research and writing activities. To illustrate the point, a number of years ago I visited the Princeton University Library in Princeton, New Jersey. I was interested in researching the papers of Louis Fischer, a prominent journalist of the 1930's. My total expenses for this brief trip of five working days were 469.00 dollars. I have not, unfortunately, been able to utilize in any published work the information that I obtained at the Princeton Library. Under the current law I should not be able to recover this as an "actual and necessary" expense. Yet, to an historian, this is a research expense like any other. In effect, the current law allows me to recover my production-related expenses only if I can tie them to a final published work. This restriction adversely affects me, as I depend on *any* income I am able to receive from my research and writing activities in order to offset my overall research expenses.

5. The managers of federal historical programs have always encouraged scholarship outside the office in the interest of promoting the professional development of their employees. Government historians, not unlike their colleagues in the academic community, tend to be judged in some measure by the quantity and quality of the sum total of their publications. The prohibition on receipt of honoraria will discourage scholarship outside the workplace, which will tend to confer an advantage upon those able to bear the costs of non-deductible expenses and will tend to retard the development of professional skills among government historians. For history, unlike mathematics or theoretical physics, is not a discipline in which progress depends greatly upon flashes of brilliance and intuition. It is through the patient accumulation of knowledge and experience that the historian hones his skills. The more a historian reads, the more he writes, the better his scholarship will be. Studies have shown that historians tend to do their best work around the age of sixty-five—later than almost any other learned discipline.

6. No one has alleged that members of the tenured federal work force are being corrupted with offers of fees for writing and speaking. My outside activities have always conformed to the requirements of the regulations, which I believe are designed to strike the proper balance between giving proper freedom to government employees and avoiding conflicts of interest and other undesirable effects.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15th, 1991

/s/ Eduard Mark

EDUARD MARK

Mark Declaration, Exhibit B

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington, DC 20330-5000

AF REGULATION 30-30

26 May 1989

Personnel

STANDARDS OF CONDUCT

This regulation applies to all Air Force personnel and activities, including the Air National Guard and US Air Force Reserve units and members. It explains Air Force personnel standards of conduct that relate to possible conflict between private interests and official duties, regardless of assignment. Close adherence to these principles will ensure compliance with the high ethical standards demanded of all public servants. Violations of the specific prohibitions and requirements of this regulation by military personnel may result in prosecution under the Uniform Code of Military Justice (UCMJ). Violations of this regulation by Air Force civilian employees may result in appropriate disciplinary action without regard to criminal liability. Administrative action, such as reprimand, may be taken with regard to military members and civilian employees who violate any requirements of this

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Supersedes AFR 30-30, 21 June 1983, and AFR 30-14, 6 May 1981.
(See signature page for summary of changes.)
No. of Printed Pages: 43
OPR: JACM (Lt Col J. Conley Meredith)
Approved by: Col Franklin W. Losey
Writer-Editor: Helen Miller
Distribution: F

regulation even if such violations do not constitute criminal misconduct.

This regulation implements Department of Defense (DOD) Directive 5500.7, 6 May 1987. It further implements Executive Order 12674, April 12, 1989, prescribing standards of ethical conduct for government officers and employees (attachment 1) and Office of Personnel Management (OPM) regulations (5 Code of Federal Regulations (CFR) Part 734 et seq.). It is in agreement with the Code of Ethics for Government Service (Public Law (P.L.) 96-303) that applies to all government personnel (attachment 2). It includes standards of conduct based on the revisions of the conflict of interest laws enacted in 1962 (P.L. 87-849), as amended, and by the Ethics in Government Act of 1978 (P.L. 95-521), as amended; it incorporates reporting requirements imposed by 10 United States Code (U.S.C.) 2397a. on certain employees and active duty officers who contact, or are contacted by, certain DOD contractors regarding future employment with that defense contractor; and includes employment restrictions on three categories of former DOD officers or employees from accepting compensation from a defense contractor during a 2-year period after their separation as required by 10 U.S.C. 2397b. It incorporates the procedures for completing DD Form 1787, Report of DOD and Defense Related Employment, as required by 10 U.S.C. 2397 and the procurement integrity provisions of 41 U.S.C. 423.

This regulation is affected by the Privacy Act of 1974. Each form required by this regulation includes a Privacy Act Statement in the body of the document or in a separate attachment to the form.

Section A—General Information

1. Terms Explained:

a. Air Force Personnel. Use in this regulation, unless the context indicates otherwise, means all civilian employees, including special government employees, in the Department of the Air Force (including nonappropriated fund activities), all regular and reserve officers and enlisted members of the Air Force on active duty, and officers and enlisted members of the Air Force Reserve on inactive duty for training. The definition includes professors and cadets of the US Air Force Academy.

b. Competing Contractor. This term, with respect to any procurement (including procurements using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for, or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

c. Defense Contractor. Any individual, firm, corporation, partnership, association, or other legal entity that enters into a contract directly with DOD to furnish services, supplies, or both, including construction, to the DOD. Subcontractors are excluded, as are subsidiaries unless they are separate legal entities that contract directly with DOD in their own names. Foreign governments or representatives of foreign governments that are engaged in selling to DOD are defense contractors when acting in that context.

d. Department of Defense (DOD) Personnel. All civilian officers and employees, including special government employees, of all the offices, agencies, and DOD departments (including nonappropriated fund activities); all regular and reserve component officers (commissioned and warrant) and enlisted members of the Army, Navy, Air Force, and Marine Corps on active duty; and reserve component officers (commissioned and warrant) and enlisted members on inactive duty for training. This definition includes professors and cadets of the military service academies.

e. Former Military Officer. Reserve officers not on active duty are included in the meaning of this phrase.

f. Gratuity. Any gift, favor, entertainment, hospitality, transportation, or loan; any other tangible item; and any intangible benefits (e.g., discounts, passes, and promotional vendor training) given or extended to, or on behalf of, Air Force personnel, their immediate families, or households for which fair market value is not paid by the recipient or the US Government.

g. Honorarium (and All Variations). A payment of money or anything of value received by an officer or employee of the federal government if it is accepted as consideration for an appearance, speech, or article. The term does not include payment for or provision of actual travel and subsistence, including transportation, accommodations, and meals of an officer or employee and spouse or aide, and does not include amounts paid or incurred for any agent's fees or commissions.

h. Inside Information. Information generally not available to the public and obtained by reason of one's official Air Force or DOD duties or position.

i. Personal Commercial Solicitation. Any effort to contact an individual to conduct or transact matters involving business, finance, or commerce. This does not include off-duty employment of personnel as employees in retail stores or other situations that do not include solicited sales.

j. Procurement Official. Any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement (and as further defined by applicable implementing regulations).

k. Reserve Officers. Includes commissioned officers of the Air National Guard and Air Force Reserve.

NOTE: As of the date of this regulation, offices responsible for implementing the Office of Federal Procurement Policy Act amendments of 1988, P.L.100-679, have not further defined the terms in b and j above.

2. Applicability and Waiver of This Regulation. This regulation applies to all Air Force personnel and activities. All Air Force personnel will become familiar with and comply with this regulation (including attachments 1 through 9). Except as specifically provided in this regulation, waivers of and exceptions to the requirements of this

regulation may be authorized or approved only by the Secretary of the Air Force (SAF). Requirements of this regulation that are based on higher authority may not be waived.

3. Ethical Standards of Conduct:

a. General Principles. Government service or employment is a public trust requiring Air Force personnel to place loyalty to country, ethical principles, and the law above private gain and other interests. Air Force personnel shall not take or recommend any action, including authorizing or recommending any expenditure of funds, known or believed to be in violation of US laws, Executive Orders, or applicable directives, instructions, or regulations. If the legality or propriety of any contemplated action is in question, Air Force personnel will consult with the appropriate Air Force Ethics Official or Standards of Conduct Counselor (see paragraphs 29 through 31).

b. Affiliations and Financial Interests. Air Force personnel must not take part in any personal, business, or professional activity or receive or retain any direct or indirect financial interest that places them in a position of conflict between their private interests and the public interests of the United States and that relates to their responsibilities as Air Force Personnel or to the duties or responsibilities of their Air Force jobs. For purposes of this prohibition, the private interests of a spouse, a minor child, and any other household members are treated as private financial interests of Air Force personnel. Air Force personnel may, however, have financial interests or engage in financial transactions to the same extent as private citizens not employed by the government as long as they are not prohibited by law or this regulation. Also see paragraph 18d.

c. Code of Ethics for Government Service. All Air Force employees should adhere to the Code of Ethics for Government Service (attachment 2). Copies of the Code of Ethics for Government Service will be displayed in appropriate areas of federal buildings in which at least 30 persons are regularly employed as civilian employees.

d. Compliance With Laws. Air Force personnel must not engage in criminal, illegal, or dishonest conduct or other conduct prejudicial to the government. Soliciting, accepting, or agreeing to accept anything of value in return for influencing, performing, or refraining from performing an official act or lawful duty is a crime (18 U.S.C. 201). Other federal laws applicable to Air Force personnel are contained in attachment 3.

e. Other Proscribed Actions. Air Force personnel must avoid any action, whether or not specifically prohibited by this regulation, that might result in, or create the appearance of:

(1) Using public offices for private gain.

(2) Giving preferential treatment to any person.

(3) Impeding government efficiency or economy.

(4) Losing complete independence or impartiality.

(5) Making a government decision outside official channels.

(6) Adversely affecting the confidence of the public in the integrity of the government.

f. Dealing With Present and Former Military and Civilian Personnel. Air Force personnel must not know-

ingly deal with present or former military or civilian personnel of the government if such action is prohibited by law or this regulation. (See paragraph 18.)

g. Equal Opportunity. Air Force personnel must scrupulously adhere to the Air Force civilian and military programs of equal opportunity. See AFRs 30-2 and 40-1613.

4. Using Inside Information. Air Force personnel must not engage in any personal, business, or professional activity, nor enter into any financial transaction that involves the direct or indirect use of inside information for personal advantage to themselves or others. This prohibition against use of inside information obtained while at the Department of the Air Force continues even after the individual terminates government service or employment.

5. Gratuities:

a. Policy Basis. Air Force personnel or their families who accept gratuities, no matter how innocently tendered and received, from those who have or seek business with DOD and from those whose business interests are affected by DOD or Air Force functions may:

(1) Be a source of embarrassment to DOD.

(2) Affect the objective judgment of the DOD personnel involved.

(3) Impair public confidence in the integrity of the government.

b. General Prohibition. Except as provided in attachment 4, Air Force personnel and their immediate families must not solicit, accept, or agree to accept any gratuity for themselves, members of their families, or others (either directly or indirectly) from, or on behalf of, any defense contractor or any source that:

(1) Is engaged in or seeks business or financial relations of any sort with any DOD component.

(2) Conducts operations or activities that are either regulated by a DOD component or significantly affected by DOD decisions.

(3) Has interests that may be substantially affected by the performance or nonperformance of the official duties of DOD personnel.

(4) Is a foreign government or representative of a foreign government that is engaged in selling to DOD, when the gratuity is tendered in the context of the foreign government's commercial activities. See AFR 11-27.

c. Limited Exceptions. Limited exceptions to the general prohibition on accepting gratuities and additional guidance or gratuities are in attachment 4.

d. Foreign Gifts. Procedures concerning gifts from foreign governments are in AFRs 11-27 and 900-48.

e. Air Force Reserve Officer Training Corps (AFROTC) Members. Procedures concerning AFROTC staff members are in AFR 45-5.

f. Acceptance of Gratuities in Connection With Official Travel. Procedures for accepting transportation, accommodations, meals, or services furnished in connection with official travel are set forth in attachment 4.

g. Prohibited Acceptance of Gratuities by Procurement Officials. During the conduct of any federal agency procurement of property or services, no procurement official of such agency shall knowingly ask for, seek, accept, or agree to receive any money, gratuity, or thing of value from any officer, employee, representative, or consultant of any competing contractor for such procurement. Procurement officials are defined in paragraph 1j. Violators

are subject to civil fine not in excess of $100,000 (P.L. 100-679, Sec 6). Attachment 4 exceptions apply.

6. Contributions or Gifts to Superiors. Air Force personnel must not solicit a contribution from other DOD personnel for a gift to an official superior, make a donation or a gift to an official superior, or accept a gift or donation from other subordinate DOD personnel. This prohibition also applies to gifts or contributions to immediate family members of an official superior. However, this paragraph does not prohibit voluntary gifts of reasonable value or voluntary contributions of nominal amounts (or acceptance thereof) on special occasions such as marriage, illness, transfer, or retirement, provided any gifts acquired with such contributions do not exceed a reasonable value under the circumstances.

7. Using Government Facilities, Property, and Manpower. Air Force personnel have a positive duty to protect and conserve government property and facilities. Air Force personnel must not directly or indirectly use, or allow the use of, government property or facilities, including property or facilities leased to the government, for other than officially approved activities. Government facilities, property, and manpower must be used only for official government business. Government facilities, property, and manpower include (but are not limited to), equipment, supplies, duplication machines, computer facilities, stenographic and typing assistance, and chauffeur services. This paragraph is not intended to prevent using government facilities, property, or manpower for approved activities that would further military-community relations, provided such use does not interfere with military missions.

8. Using Official Air Force Position. Air Force personnel must not use their Air Force positions to induce,

coerce, or influence a person (including subordinates) in any way to provide any personal benefits, financial or otherwise, to themselves or others.

9. Using Civilian and Military Titles in Connection With Commercial Enterprises or Fund-Raising Activities:

a. Full-time Air Force civilian employees or active duty military personnel are not allowed to use their grade, official title, or positions in connection with any commercial enterprise or for endorsing a product. Such personnel may make speeches or publish books or articles that identify them by reference to their title or position, provided that the subject material of such speech or publication is approved for public release according to paragraph 12c and has been cleared under existing Air Force procedures. See AFR 190-1.

b. All retired military personnel and all members of reserve components, not on active duty, are permitted to use their military titles in connection with commercial enterprises if they indicate their reserve or retired status. Such use of military titles must in no way cast discredit on the Air Force or DOD. Such use is also prohibited in connection with commercial enterprises if such use (with or without the intent to mislead) gives rise to any appearance of sponsorship, sanction, indorsement, or Air Force or DOD approval. The Air Force may restrict retired personnel and members of reserve components not on active duty from using their military titles in connection with public appearances in oversea areas.

c. The high visibility of Air Force officials generate requests from charitable and non-profit organizations to use an official's name and title in conjunction with fund-raising activities. The use of names and titles of Air Force officials, even regarding fund-raising activities of charitable organizations, may give an improper impres-

sion that the Department of the Air Force endorses the activities of a particular organization, thereby resulting in unauthorized assistance for the organization or sponsors of the activities. The presence of Air Force officials may be sought, under the guise of bestowing awards upon the official, to promote attendance at programs. Air Force officials shall not allow the use of their names or titles in connection with charitable or nonprofit organizations, subject to the following:

(1) The Department of the Air Force may assist only those charitable programs administered by the OPM under its delegation from the President and those other programs authorized by other Air Force regulations.

(2) This prohibition does not preclude Air Force officials from giving speeches before such organizations if the speech is designed to express an official position in a public forum.

(3) This prohibition does not preclude volunteer efforts on behalf of charitable or non-profit organizations by individuals who do not use their official titles in relation to solicitations and who do not solicit from individuals or entities with whom they do business in their official capacity.

(4) Air Force officials may endorse the United Service Organizations (USO) publicly and factually for the beneficial work they do in supporting the military community and may attend USO fund-raising events in an official capacity.

10. Commercial Soliciting by Air Force Personnel. To eliminate the appearance of coercion, intimidation, or pressure from rank, grade or position. Air Force personnel are prohibited from making personal commercial solicitations or solicited sales to DOD personnel who are

junior in rank or grade, or their family members, at any time, on or off-duty. (See paragraph 1i):

a. This limitation includes, but is not limited to, soliciting and selling insurance, stocks, mutual funds, real estate, and any other commodities, goods, or services.

b. This prohibition does not apply to the one-time sale or lease by an individual of personal property or a privately owned dwelling.

c. For civilian personnel, the limitation applies only to personnel under their supervision at any level.

11. Membership in Associations. All Air Force personnel who are members or officers of nongovernmental associations or organizations must avoid activities for such associations or organizations that are not compatible with their official government positions. Further, Air Force personnel must not accept an honorary office or an honorary membership in any trade or professional association whose membership includes business entities that are engaged or are endeavoring to engage in providing goods or services to a DOD component (including any nonappropriated fund activity of DOD). An honorary office includes any position, whether termed honorary or not, selected on the basis of an official DOD function, or assignment. (See AFR 30-9.)

12. Outside Employment of Air Force Personnel:

a. Air Force personnel must not engage in outside employment or other outside activity, with or without compensation, that:

(1) Interferes with or is not compatible with performing their government duties.

(2) May reasonably be expected to bring discredit on the government or DOD.

(3) Is otherwise inconsistent with the requirements of this regulation, including the requirement to avoid actions and situations that reasonably may appear to create conflicts of interests.

b. Air Force enlisted members on active duty may not be ordered or permitted to leave their post to engage in a civilian pursuit or business or perform in civil life (for emolument, hire, or otherwise) if the pursuit, business, or performance interferes with the customary or regular employment of local civilians in their art, trade, or profession (10 U.S.C. 974).

c. Air Force personnel are encouraged to engage in teaching, lecturing, and writing. See paragraph 13, if applicable:

(1) Air Force personnel must not engage in teaching, writing, or lecturing (whether for compensation or not) that is dependent on information obtained as a result of their government service or employment. Such information may be used if it has been published or is available to the general public or will be made available on request or when the SAF gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(2) Civilian Presidential appointees must not receive pay *or* anything of monetary value for any consultation, lecture, discussion, writing, or appearance, if the subject matter is devoted substantially to the responsibilities, programs, or operations of the Air Force, or draws substantially on official data or ideas that have not become public information.

d. A military member may engage in off-duty employment with an organization involved in a strike if the member was on the payroll of such organization before

the strike started and if the employment conforms with the requirements of this regulation. After a strike begins and while it continues, a military member may not accept employment by an involved organization at the strike location. Members who are engaged in off-duty civilian employment that does not conform to the above policy are required to end such employment.

e. This paragraph does not prevent Air Force personnel from:

(1) Participating in activities of national or state political parties not prohibited by law or regulation. See AFR 110-2.

(2) Participating in affairs of or accepting an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational, nonprofit recreational, public service, or civic organization.

f. Each commander of a major command (MAJCOM) and each head of a separate operating agency (SOA) will make sure that local implementing regulations require at least that Air Force personnel obtain local commander approval for any off-duty employment with a firm or other entity that is engaged in or is endeavoring to engage in business transactions of any kind with a DOD agency. Local commanders must set internal administrative procedures to evaluate each request submitted and notify the applicant whether the proposed off-duty employment agrees with the requirements of this regulation.

13. Honoraria. Air Force personnel shall not accept honoraria or other salary supplementation for performance of official duties (see 18 U.S.C. 209) or for taking part in activities that are connected with service as an officer or employee of the government, or otherwise

tendered in the officer's or employee's official government capacity. Honoraria tendered under such circumstances become the property of the United States and must be deposited to the Treasury. Any honorarium or fee tendered by a state governmental agency for the appearance of an Air Force expert witness may be accepted only on behalf of the United States and endorsed to the Treasury of the United States as reimbursement for the expert's governmental pay while in temporary duty status as a witness. Air Force personnel shall not suggest charitable contributions in place of such honoraria. When acting in a personal rather than official capacity, honoraria may be accepted subject to the following conditions:

a. Before accepting any honorarium, Air Force personnel shall consult with the appropriate ethics official or standards of conduct counselor.

b. The appearance, speech, or article must be given and prepared on off-duty time or in a leave status.

c. An honorarium may not exceed $2,000 (excluding expenses for travel and subsistence, including for spouse or aide, and agents' fees or commissions) per appearance, speech, or article (see 2 U.S.C. 441i).

d. Air Force personnel shall not accept an honorarium from any DOD contractor if such acceptance may result in a conflict of interest or the appearance thereof. Before accepting an honorarum from a DOD contractor, written approval must be obtained from the individual's superior and the appropriate ethics official or standards or conduct counselor.

14. Relationship With Defense Contractors:

a. Prohibited Conduct. Air Force personnel shall not use the Department's relationship with defense contractors or potential defense contractors to induce, coerce, or seek

any favors, gratuities, or actions other than those authorized by contract or by law.

b. Commitments or Promises. Air Force personnel, other than contracting officers acting in their official capacity, shall not make any commitment or promise relating to award of a contract nor make any representation that reasonably may be construed as such a commitment.

c. Release of Information. Air Force personnel must not release any information concerning proposed acquisitions or purchases by any Air Force contracting activity, except according to authorized procedures.

15. Assigning Reservists for Training. Air Force personnel who are responsible for assigning reservists for training must not assign them to duties in which they will obtain information that could be used by them or their private sector employers to the disadvantage of civilian competitors. Reservists must disclose to their superiors and assignment personnel information necessary to make sure that no conflict exists between their duty assignments and private employment. Reservists on promotion boards shall not participate in promotion decisions that may directly or predictably affect their private financial interests.

16. Gambling, Betting, and Lotteries. Air Force personnel must not take part in any unauthorized gambling activity while on government owned, controlled, or leased property, or while on duty for the government. This includes operating a gambling device; conducting a lottery, pool, or game for money or property; or selling or purchasing a numbers slip or ticket. However, this paragraph does not prevent:

a. Activities necessitated by an employee's law enforcement duties.

b. Fund-raising activities under Section 3 of Executive Order 10927 and similar Air Force approved activities, including those found in AFRs 176-1, 215-1, 215-11, and 215-21, or as otherwise authorized.

c. Authorized sale and purchase of state lottery chances at vending facilities operated by blind licensees according to the Randolph-Sheppard Vending Stand Act (20 U.S.C. 107-107f) and implementing regulations (34 CFR 395.35(c)(3)).

d. Other activities that have been specifically approved by SAF.

17. Indebtedness. Air Force personnel must pay in a proper and timely manner their just financial obligations, especially those imposed by law, such as federal, state, and local taxes. For purposes of this paragraph, "just financial obligation" means one acknowledged by the individual or reduced to judgment by a court, and "in a proper and timely manner" means in a manner that under the circumstances does not reflect adversely on the government as the debtor's employer. This paragraph does not require the Air Force to determine the validity or amount of disputed debts.

Section B – Implementation of Conflict of Interest Laws

18. Full-Time Air Force Officers and Employees:

a. Definition. The term "full-time officer or employee" includes all civilian officers and employees and all military officers on active duty, except those who are "special government employees" (see paragraph 19); it does not include enlisted personnel. Enlisted personnel are included in the term "Air Force personnel" (see paragraph 1a).

b. Prohibited Compensation. Full-time officers and employees are prohibited from directly or indirectly receiving or seeking compensation for services rendered or to be rendered before any department or agency in connection with any contract, claim, controversy, or particular matter in which the United States is a party or has a direct and substantial interest. The purpose of this section is to reach any situation, including those where there is no intent to be corrupted or to provide preferential treatment, in which the judgment or efficiency of a government agency might be influenced because of payments or gifts, made by reason of the position occupied, to that official in a manner otherwise than provided by law. (18 U.S.C. 203).

c. Prohibited Representation. Full-time officers and employees may not, except in discharging their official duties, represent anyone else before a court or government agency in a particular matter in which the United States is a party or has a substantial interest. This prohibition applies both to paid and unpaid representation of another (18 U.S.C. 205).

d. Prohibited Salary Supplementation. Full-time officers and employees may not receive any salary or supplementation of their government * * *.

EXHIBIT 16

DECLARATION OF ARNOLD A. PUTNAM

1. I am an Electronics Engineering Technician employed by the United States Government at the Portsmouth Naval Shipyard in Kittery, Maine. I work on shipboard radio, radar, sonar, navigation, fire control equipment and internal communications equipment for the External Engineering Support Area, Code 280.25.41. Specifically, I prepare and develop engineering drawings for electronic equipment aboard nuclear submarines. I have been employed by the government for 18 years. My current government grade level is GS-11. My home address is Rural Route 2, Box 1354, Wildes District Road, Kennebunkport, Maine, 04046.

2. On my own time and without using government resources, I write articles for publication in the areas of philosophy, American history, and the history of science and technology. According to Portsmouth Naval Shipyard Instructions, "(s)hipyard personnel are encouraged to engage in teaching, lecturing, and writing." Portsmouth Naval Shipyard Instruction 5370.2F. Shipyard personnel may not, however, engage in activities dependent on information obtained as a result of government employment, unless that information has already been made available to the public. *Id.* The articles I write for publication do not rely on information I have obtained as a result of my government employment.

3. In August 1990, an article I wrote was accepted for publication in *Yankee Magazine* (Dublin, New Hampshire) entitled "Portsmouth's Civil War Monitor." A monitor is a type of ship, powered by steam, with one or more revolving turrets. My article discusses the "USS AGAMENTICUS," a monitor constructed during the Civil War. I was paid $150 for first magazine rights. *Yankee Magazine* intends to publish the article in its "Historical Footnote" section this year.

4. Until the law banning honoraria went into effect, I had been pursuing research for two articles that I had planned to publish, if accepted. One article involves Light Draft Civil War Monitors, which I had intended to submit to *United States Naval Institute Proceedings*, a private publication. The other involves the mechanical operations of monitor turrets, which I had intended to submit to *Scientific American*. I had planned to complete both articles and submit them for publication some time this year. Because of the new law banning honoraria, I have ceased my research until such time as the questions concerning the law have been resolved.

5. If the honoraria ban remains in effect, I will probably cease my research altogether. The research for my articles requires that I expend significant funds up front, before my articles are accepted for publication. For example, I have been required to travel to Washington, D.C., Boston, and New York in order to review sources not otherwise available to me. I bear the expenses incurred for this travel on my own. I do not take any tax deductions for such expenses because the IRS regards my outside writing as a "hobby." Without the prospect of receiving any compensation for my published articles, I have been forced to discontinue my research. I cannot afford to continue my research and writing if I am not allowed to realize any return whatsoever on my investment of time and money.

6. Eventually, I would like to publish a book on the development, construction, and operation of monitors used in the Civil War. I envision that this book would be a definitive study on the different shipbuilding techniques used by the Confederate and Union forces during the Civil War. However, if my manuscript is to stand a real chance of publication, I must first establish a "track record" by publishing articles in this field. Since the new law banning honoraria will affect whether I continue to research,

write, and submit articles, it will also affect my ability ultimately to publish this book.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 1991.

/s/ Arnold A. Putnam
ARNOLD A. PUTNAM

EXHIBIT 17

AFFIDAVIT OF JOHN C. SHELTON

1. I am employed by the Internal Revenue Service as a GS-7 tax examiner in the St. Louis District. I have been employed by the IRS for four years and have been a full-time employee since October 1988. I am a member of the National Treasury Employees Union and a steward at NTEU Chapter 14 in St. Louis.

2. In my non-work time, I write sports stories and box scores as a stringer for the Associated Press. I cover St. Louis Cardinals baseball games and St. Louis Blues hockey games. AP gives me a schedule of events to cover some weeks before they take place. If I cannot cover these games, AP assigns them to other stringers, who are eager to obtain the extra income.

3. In covering these games, I estimate that I incur $600 to $700 in annual expenses for local travel, which AP does not reimburse. On average, I earn $100 each month from October through April covering hockey games, and $300 to $500 a month from April through October covering baseball games. Over the last several years, my income from sportswriting as an AP stringer has averaged approximately $1500 to $2000 annually.

4. I am currently scheduled to cover a hockey game between the St. Louis Blues and the New York Rangers on January 5, 1991, and expect to receive additional assignments in the near future to cover other hockey games in January and February 1991. However, I have learned that federal law will prevent me from receiving compensation for these assignments, and unless a preliminary injunction goes into effect, I will be forced to turn them down.

5. Over the past several years, I have also earned extra income writing for a local hospital newsletter. While I do not currently have a contract to write for the newsletter, it is very likely that I will be asked to do so again in 1991. In 1989, the last year for which I have complete records of my income from this activity, I earned approximately $2400.

6. I have received permission from the IRS to engage in my outside writing activities because there is no possibility of conflict with my duties for the IRS.

7. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. I believe that this prohibition will cover the money that I receive for my articles.

8. Recently I bought a house under a Missouri First-Time Buyer Program mortgage financed by the Federal Housing Administration. I was told by the financial officer administering the mortgage that I would not have qualified for the mortgage if I had not been receiving the outside income from my part-time writing activities. In fact, based on my current financial situation, I will not be able to continue making payments on my mortgage if I have to give up the income from my writing. Thus, I have been placed in the predicament of choosing between my job as a tax examiner and my outside writing activities, neither of which, standing alone, can provide adequate financial support.

9. If I were compelled to end my writing career, I would lose the intellectual pleasure, as well as the additional income, that I receive from those activities.

10. If NTEU or some other plaintiff is successful in obtaining a preliminary injunction prohibiting the government from enforcing this prohibition on honoraria, I plan to continue writing. In the immediate future, for example, I would be able to cover hockey games in January, as planned.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12/15/90

/s/ John C. Shelton

JOHN C. SHELTON

EXHIBIT 18

AFFIDAVIT OF LYNDA VASTINE

1. I am employed by the Department of Health and Human Services Health Care Financing Administration, Medicare Division in Chicago, Illinois, as a Program Specialist and Freedom of Information Coordinator. I have held my current position since December 1989, and have been an HHS employee since April 1980. I am a member of the National Treasury Employees Union.

2. In my non-work time, I am a race course official at the Indianapolis Motor Speedway and at various other race tracks in a four state area. It is my intention to pursue a career as a free-lance writer of children's articles. I am an epileptic woman, and publishers of auto racing periodicals have approached me about writing articles for children about disabled people and women in auto racing. In preparation for this activity, I have enrolled in and completed a substantial part of an accredited extension course on writing for children, offered at a tuition of more than $1000 by the Institute for Children's Literature. The tuition is paid in full and nonrefundable. As part of the course, I am required to submit a children's article for publication – a requirement that, because some periodicals insist on paying for articles selected for publication, I may find difficult to meet because of the ban on writing for compensation.

3. For some time, I have also engaged in paid singing at weddings and in other public forums, in addition to unpaid performances as a member and soloist in my church choir.

4. I was recently told by my agency ethics officer that, as a result of the honoraria ban in the Ethics Reform Act, I must discontinue my paid writing and singing appearances. My agency ethics officer stated that I would be suspended if I continued these activities. According to this officer, the law provides no exception for written work or singing appearances. Therefore, I have discontinued my First Amendment activities for the duration of NTEU's law suit challenging the honoraria ban of the Ethics Reform Act. I will resume these expressive activities only if the ban on compensated writing and appearances is struck down. I have also turned down an award offered for my singing.

5. I believe that I am entitled to compensation for the time and effort I spend researching and writing articles for publication, and practicing and performing music. I estimate that the ban on paid writing and public appearances will cost me approximately $6000 annually in lost earnings. Moreover, the expenses associated with these activities do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable under the Ethics Reform Act. In addition to my course fees, I have invested approximately $8000 in word processing equipment. The Ethics Reform Act would force me to absorb these capital costs permanently, and to forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

6. While the inability to defray my capital investment in my part-time writing and singing is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially

reduced by the ban on compensated expression. The time I spend preparing articles and practicing and performing music could readily be invested in a profitable activity, such as working overtime at HHS. Because I would be entitled to accept payment for these activities if the government had not determined to regulate this field, and because the law imposes economic disadvantages on me for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities, and I find this singling out of my expressive activities for such a penalty extremely offensive.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 3/29/91

/s/ Lynda S. Vastine
LYNDA VASTINE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION,
and
JAN ADAMS GRANT,
and
THOMAS C. FISHELL,
and
ALL OTHER SIMILARLY SITUATED
UNNAMED INDIVIDUALS,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA,
and
RICHARD THORNBURGH,
IN HIS CAPACITY AS
ATTORNEY GENERAL,
and
STEPHEN D. POTTS,
IN HIS CAPACITY AS
DIRECTOR, OFFICE OF GOVERNMENT ETHICS,
and
OFFICE OF GOVERNMENT ETHICS,
DEFENDANTS.

EXHIBIT 19

STIPULATION

The parties to the above-captioned action stipulate as follows:

1. Stephen D. Potts is the Director of the U.S. Office of Government Ethics.

2. In an article in the *Washington Post* (p. A25; December 14, 1990; article written by Michael Isikoff), Mr. Potts is quoted as saying that the ban on federal employees accepting honoraria is

> "not necessary to protect the integrity of the government" and,
>
> "It's the kind of thing where you get a person who was an expert on wine and wrote occasional articles on wine or somebody who raises sheepdogs and gives talks to kennel clubs."

3. The quotations that appeared in the December 14, 1990 article in the *Washington Post* are accurate and reflect the opinion of Mr. Potts.

4. The December 14, 1990 article in the *Washington Post* is accurate in stating that the Office of Government Ethics is working with congressional sponsors to amend the Act to remove the ban on federal employees accepting honoraria for speeches, articles, and appearances for matters not related to their government work.

5. In an article in the *New York Times* (p. A24, December 4, 1990; article written by Robert Pear), Mr. Potts is quoted as saying in a December 4th interview that the law, as it now stands in its application to civil servants for speeches, articles, and appearances unrelated to their government work, is "too restrictive."

6. The quotation that appeared in the December 4, 1990 article in the *New York Times* is accurate and reflects the opinion of Mr. Potts.

7. In an article in the *San Diego Union* (p. A25, December 6, 1990; Knight-Ridder News Service), Mr. Potts is quoted as saying, in discussing the application of the Ethics in Government Act's honoraria ban to civil servants, that

> the Act was "drafted overbroadly;" and,
>
> the Act's inclusion of civil servants in its honoraria ban "was just a mistake and we'll be pushing for corrective legislation in the new term [of Congress]."

8. The quotation that appeared in the December 6, 1990 article in the *San Diego Union* are accurate and reflect the opinion of Mr. Potts.

9. The December 6, 1990 article in the *San Diego Union* is accurate in stating that Mr. Potts knows of nothing harmful or unethical when government workers speak or write about subjects unconnected to their jobs.

For Plaintiffs:	For Defendants:
/s/ Gregory O'Duden	/s/ Jeffery S. Gutman
/s/ Elaine Kaplan	
/s/ [Signature Illegible]	
Dec. 18, 1990	12/18/90
Date	Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

JOINT STIPULATION AND ORDER

The parties hereby stipulate that this case shall be certified as a class action, in accordance with Fed. R. Civ. P. 23(b)(2), brought on behalf of every "employee," as defined by the interim rule issued at 56 Fed. Reg. 1723 (January 17, 1991), to be codified at 5 C.F.R. 2636.102(c) & (d), below grade GS-16, who—but for 5 U.S.C. app.

501(b)—would receive "honoraria", as defined in 5 U.S.C. app. 505(3).

Respectfully submitted,

/s/ Jeffrey S. Gutman

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Suite 600
Washington, D.C. 20004
(202) 783-4444

Attorneys for Plaintiffs

SO ORDERED:

4/25/91
Date

/s/ [SIGNATURE ILLEGIBLE]
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Nos. 90-2922, 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

V.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,
PLAINTIFFS,

V.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PLAINTIFFS' JOINT STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

PARTIES

1. Plaintiff National Treasury Employees Union ("NTEU") is a federal-sector labor union that represents over 140,000 federal employees nationwide. Certain of NTEU's members, as well as non-member employees within NTEU's bargaining units, receive income from articles, speeches, or appearances. NTEU Second Amended Complaint, para. 3.

2. Plaintiff NTEU Chapter 143 ("Chapter 143") is a local union chapter representing employees of the

Customs Service in El Paso, Texas. NTEU Second Amended Complaint, para. 4; Giunta aff. para. 1.

3. The individual named plaintiffs and affiants are employees of the executive branch of the federal government. NTEU Second Amended Complaint, para. 5, 6; Crane Amended Complaint, para. 4-12; attached affidavits and declarations.

4. Prior to January 1, 1991, individual plaintiffs and affiants accepted compensation for a variety of articles, speeches, and appearances within the definition of Section 505 of the Ethics Reform Act (see below, para. 9) and Section 2636.203 of the regulations promulgated by the Office of Government Ethics (see below, para. 12). NTEU Second Amended Complaint, para. 5, 6; Crane Amended Complaint, para. 4-12; attached affidavits and declarations.

5. Individual plaintiffs and affiants engaged in their writing, speaking, and public appearances on their non-work time. Their writing, speaking, and public appearances were unrelated to their official duties for the government. Applying conflict of interest regulations in effect prior to January 1, 1991, the employing agencies of at least some of the plaintiffs and affiants had concluded that their writing, speaking, and public appearances did not result in a conflict of interest or the appearance of a conflict of interest with their official duties and responsibilities. Grant aff. para. 9; Fishell aff. para. 8; Mark dec. para. 2, 5; Putnam dec. para. 2; Hanna dec. para. 4.

6. The defendants are the United States of America, Attorney General Richard Thornburgh, the Office of Government Ethics ("OGE"), and OGE Director Stephen D. Potts. NTEU Second Amended Complaint, para. 8, 9, 10; Crane Complaint, para. 14, 15, 16.

THE BAN ON RECEIPT OF "HONORARIA" IN THE ETHICS REFORM ACT OF 1989

7. Executive branch employees have long been prohibited from receiving any compensation for speaking and writing on subjects that focus specifically on the employing agency's responsibilities, policies and programs, that create a conflict of interest or the appearance of one, or that interfere with the employee's official duties. 5 C.F.R. Ch. 1, Section 735.203.

8. Federal employees have long been permitted and, indeed, encouraged to engage in teaching, lecturing and writing that does not conflict with their official duties. 5 C.F.R. Ch. 1, Section 735.203(c). Agencies have viewed employee publication of articles as enhancing the government's reputation or promoting the professional development of their employees. Deutsch dec. para. 8; Mark dec. para. 5.

9. Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) was enacted on November 30, 1989, and took effect on January 1, 1991. Sec. 603. Sec. 501(b) states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." Sec. 505 defines "officer or employee" as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code)." Sec. 505 further defines "honorarium" as "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses. . . ."

10. Section 504 of the Ethics Reform Act provides that "[t]he Attorney General may bring a civil action in any

appropriate United States district court against any individual who violates any provision of section 501. . . . The court in which such action is brought may assess against such individual a civil penalty of not more than $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater."

11. The Office of Government Ethics ("OGE") is charged with administrative authority, under 5 U.S.C. app. 503, to issue rules and regulations under this Title with respect to officers and employees of the executive branch.

12. OGE issued initial guidance on November 28, 1991, and issued interim regulations on January 17, 1991, effective January 1, 1991. 56 Fed. Reg. 1721 (Jan. 17, 1991), to be codified in 5 CFR Part 2636. The regulations include the following definitions:

> *Article* means a writing other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings. The term does not include works of fiction, poetry, lyrics, or script.
>
> *Speech* means an address, oration, or other form of oral presentation, whether made in person, recorded, or broadcast. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of an *appearance* in paragraph (b) of this section. It does not include the conduct of worship services or religious ceremonies.

> *Appearance* means attendance at a public or private conference, convention, meeting, hearing, event or other gathering and the incidental conversation or remarks made at that time. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display.

56 Fed. Reg. at 1725-26. The regulations further provide that "speech" does include "a talk on theology given to other ministers, . . . offering a prayer at the opening of a convention or . . . delivering a sermon during a worship service conducted by another minister." 56 Fed. Reg. at 1726.

13. The regulations issued by OGE define "Honorarium" as "a payment of money or anything of value for an appearance, speech or article." 56 Fed. Reg. at 1725. Receipt of payment is prohibited even if the writing and speaking occur during nonwork hours, and even when they result in no real or apparent conflict with the employees' official duties.

14. Stephen D. Potts, the Director of OGE, is of the opinion that the extension of the ban to lower level federal employees is "not necessary to protect the integrity of the government," was "drafted overbroadly," is "too restrictive," and, in fact, "was just a mistake." Stipulation (Exh.).

15. OGE strongly supported the efforts during the last term of Congress to amend the Ethics Reform Act to permit career government employees to continue to receive compensation for appearances, speeches, or articles (136 Cong. Rec. S17258 (Oct. 26, 1990) (statement by Sen. Glenn excerpting letter from Potts urging corrective

legislation)). Under legislation supported by the administration, employees could receive honoraria for such activities if those activities were unrelated to their official duties and the party offering the honoraria had no interests that might be substantially affected by the performance or nonperformance of that individual's official duties (*Id.*).

IMPACT OF THE HONORARIA BAN ON PLAINTIFFS

16. Before January 1, 1991, plaintiff NTEU Chapter 143 regularly published a newsletter that it distributed to bargaining unit employees. Chapter 143 used the newsletter to communicate important work-related and union-related matters to bargaining unit employees. Chapter 143 paid a federal employee, on a non-contractual, free-lance basis, to write its newsletter. Giunta aff. para. 3, 4, 5.

17. The employee hired by Chapter 143 to write its newsletter is barred by the Ethics Reform Act from accepting compensation for the articles that he writes. He refuses to write the newsletter without compensation. Giunta aff. para, 6, 7, 8.

18. Chapter 143 has been unable to find any qualified federal employee to write the newsletter without compensation or any other qualified non-employee who is willing to write the newsletter for the compensation that Chapter 143 is able to pay. Chapter 143 is unable to publish a regular, timely, comprehensive, well-written, and well-informed newsletter without the services of a paid writer. As a result, Chapter 143 has been unable to publish its newsletter since January 1, 1991. Its ability to communicate with bargaining unit employees has been severely hampered by the loss of its newsletter. Giunta aff. para. 8, 9, 10.

19. Individual plaintiffs and affiants incur various expenses in the course of writing or speaking for which they cannot accept reimbursement under the statute and the regulations. These expenses include the purchase of word processing equipment and software, professional memberships, subscriptions to publications, purchase of research and professional books, purchase of audio equipment, maintenance of home offices, and other expenses of a capital nature or unrelated to a specific article, speech, or public appearance. Kennedy supp. aff. para. 4; Fishell supp. aff. para. 4; Grant supp. aff. para. 4; Vastine aff. para. 5; Deutsch dec. para. 14; Mark dec. para. 3, 4.

20. Some plaintiffs incurred loss of pay from their federal job in order to pursue their expressive activity. Plaintiff Crane took an extended leave without pay in order to pursue his research. Crane dec. para. 3. Plaintiff Feyer sometimes takes leave without pay to present his religious lectures and classes. Feyer dec. para. 4.

21. Travel or research expenses (such as photocopying) are often incurred over an extended period of time. They may not be related to a particular published article or speech or, indeed, to any article or speech. Free-lance writers and speakers often offset their expenses, not against a particular article or speech, but rather against their income from their writing and speaking activity taken as a whole over an extended period of time. Mark dec. para. 4; Deutsch dec. para. 14; Hanna dec. para. 12; Gordon dec. para. 13.

22. Some plaintiffs and affiants deduct their expenses on their tax returns as business expenses and depreciate their capital investments. Mark dec. para. 3. If their writing, speaking, or public appearances are no longer compensible activities, they will suffer adverse tax consequences. Mark dec. para. 3; Kennedy supp. aff. para. 4; Grant supp. aff. para. 4.

23. Individual plaintiffs and affiants have invested time, effort, and expense in developing the expertise and skill necessary to write articles, deliver speeches, and make public appearances. Some have advanced degrees in the fields on which they lecture or write. Fishell supp. aff. pars. 4; Feyer dec. para. 3; Grant supp. aff. para. 4. Others have taken course work specifically intended to further their writing and speaking careers. Vastine aff. para. 2; Kennedy supp. aff. para. 4. The compensation that they earn from their writing, speaking, and public appearances is partial reimbursement for that investment.

24. Individual plaintiffs and affiants have devoted time to their writing, speaking, and public appearances that they could spend on other outside employment for which they would be legally entitled to accept compensation. Kennedy supp. aff. para. 6; Grant supp. aff. para. 5; Fishell supp. aff. para. 5; Vastine aff. para. 6.

25. Some plantiffs and affiants cannot afford to continue writing or speaking, at least at current levels, without compensation. Gordon dec. para. 14, 15; Shelton aff. para. 8. Some have already, others will soon, and still others will eventually, abandon their unpaid expressive activity for other, paid part-time employment. Hanna dec. para. 11, 13; Kennedy supp. aff. para. 3. Others will choose between continuing their writing or speaking careers and continuing their government employment. Deutsch dec. para. 16; Feyer dec. para.9.

26. Individual plaintiffs and affiants derive significant incentive to engage in writing, speaking, and public appearances from the compensation that they receive from such activity. The incentive is both financial and psychological. Thus, certain individuals are motivated, at least in part, from the desire or need to earn additional income from their expressive activity. In addition, the

receipt of income from an activity is a reaffirmation of the worth of that activity in the eyes of both the recipient and society as a whole. The inability to accept compensation for writing or speaking directly undermines their incentive to engage in that activity. Deutsch dec. para. 10, 12; Shelton aff. para. —; Hanna dec. para. 11; Grant supp. aff. para. 5; Gordon dec. para. 14, 15; Kennedy supp. aff. 6; Fager dec. para. 5.

27. Some individual plaintiffs and affiants have ceased or curtailed their writing, speaking, or public appearances as a result of the ban on their receipt of compensation for those activities. Putnam dec. para. 4, 5; Grant supp. aff. para. 3; Fishell supp. aff. para. 3; Deutsch dec. para. 10, 11; Hanna dec. para. 10, 13; Jackson dec. para. 6.

28. Some plaintiffs and affiants will temporarily continue to write or speak without compensation, in order to protect their credentials and with the intention of resuming compensated expression as soon as legally permitted. Jackson dec. para. 7; Kennedy supp. aff. para. 3. Some are continuing their expressive activities and are placing their compensation in escrow. Feyer dec. para. 8, 9; Gordon dec. para. 11. They will either leave the government or cease or curtail that activity if the challenged statute is not legislatively amended or declared unconstitutional. Kennedy aff. para. 3; Feyer dec. para. 9; Gordon dec. para. 15. One plaintiff has accepted compensation for an article written to protest the ban and has donated the sum received to charity. Crane dec. para. 9, 10.

29. Article writing by certain individual plaintiffs and affiants assists them in other endeavors not covered by the ban, such as the publication of books. A failure to write and publish articles can harm plaintiffs in securing publication of their books. Grant aff. para. 7; Putnam

dec. para. 6. Publication of articles can provide helpful scholarly feedback and can pique readers' interest in the subject, encouraging interest in other works by the plaintiffs. Hanna dec. para. 9.

30. Continued article writing, speaking, and public appearances are necessary to further the professional careers of certain plaintiffs and affiants, to develop and maintain relationships with editors and publishers, or to assist them in making career changes into fields related to their writing, speaking, and appearances. For example, plaintiff Hanna will suffer damage to her scholarly reputation if her outside writing, lecturing and consulting are diminished. Hanna dec. para. 15. Plaintiff Mark is a professional historian whose career also depends on continued publication of scholarly articles. Mark dec. para. 5. Affiant Kennedy depends on her writing to develop credentials for a planned career change. Kennedy aff. para. —. The ban on receipt of compensation forces them to choose between sacrificing income and sacrificing long-term professional goals.

31. Certain publishers refuse to publish articles without paying for those articles. Some professional associations, including those to which some plaintiffs belong, strongly discourage or prohibit their members from writing without compensation. Jackson dec. para. 6, 7, 8; Kennedy supp. aff. para. 2; Vastine aff. 2.

32. Some agency ethics officers have distributed incorrect or incomplete information to employees. Employee Vastine has been told that she cannot receive compensation for singing in church. Vastine aff. para. 4. Employee Gordon was told that he could accept travel expenses but was not told that he could accept actual expenses. Gordon dec. para. 8. Employee Gordon was also led to believe that use of the escrow account procedure endorsed by the

Court of Appeals would not keep him from violating the statute. Gordon dec. para. 11. Employee Fager did not receive a response to his query about whether payment for his speech activity was prohibited until the day before he had to leave to deliver his lecture. Even then, he was not told that the lecture was not covered by the statute because he had agreed to deliver it before the effective date of the statute. Fager dec. para. 4.

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Dated at Washington, D.C.
this 30th day of April, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 90-2922 (TPJ), 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

V.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,

PLAINTIFFS,

V.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants submit this Response to Plaintiffs' Joint Statement of Material Facts Not in Dispute. We do not believe there are any material facts as to which there is a genuine issue necessary to be tried. However, some of the facts set forth in plaintiffs' Statement are either inaccurate, unsupported or immaterial. Defendants respond to these statements of fact below. Those facts not specifically responded to are not disputed.

1. The second sentence states that certain NTEU members and non-member employees "receive" income from speeches, articles, or appearances. This may be a typographical error. NTEU may have meant to say "received."

4. The statement that, prior to January 1, 1991, individual plaintiffs and affiants accepted compensation for a variety of articles, speeches and appearances is not supported by the record. Affiant Giunta does not allege that he has accepted such compensation. Plaintiffs' Exhibit 12.

5. The statement that individual plaintiffs and affiants engaged in their writing, speaking, and public appearances on their nonwork time is not supported by the record. The declarations of Fager, Fishell, Giunta, Gordon and Jackson do not state that these affiants engaged in this activity on nonwork time. Plaintiffs' Exhibits 8, 10, 11, 12, 13, 17.

The statement that their (individual plaintiffs and affiants) writing, speaking, and public appearances were unrelated to their official duties is not supported by the record. Affiant Deutsch's writing on business and economics issues is closely related to, if not overlapping of, his work as business editor and senior writer/correspondent on economics for the Voice of America. Plaintiffs' Exhibit 7. Affiant Hanna states that, if an article she writes is directly related to her government work, she does not accept compensation for it, suggesting that some of her writing is related to her official duties. Plaintiffs' Exhibit 16. Affiant Mark's writing, listed on his attached resume, is closely related to, if not overlapping of, his writing as an Air Force historian. Plaintiffs' Exhibit 20.

The statement that the employing agencies of some of the plaintiffs and affiants had applied conflict of interest regulations in effect prior to January 1, 1991 and concluded that their writing, speaking and public appearances did not result in a conflict of interest or an apparent conflict of interest is not supported by each of the cited declarations or affidavits. The Fishell and Hanna declarations state and the Mark declaration implies that their agencies authorized them to engage in their writing or speaking, but do not state that their agencies specifically applied the conflict of interest rules and concluded that no conflict or apparent conflict existed. The Putnam declaration does not state that he sought agency authorization for his writing.

7. Plaintiffs do not paraphrase 5 C.F.R. § 735.203 accurately. The regulation speaks for itself, but, for example, § 735.203(c) prohibits only Presidential employees covered by § 401(a) of E.O. 11122 from receiving compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency.

8. Plaintiffs do not paraphrase 5 C.F.R. § 735.203(c) accurately. The regulation speaks for itself, but § 735.203(c) provides that employees are encouraged to engage in teaching, lecturing, and writing but only if it is not prohibited by law, E.O. 11122, 5 C.F.R. Part 735 and agency regulations.

9. Plaintiffs do not fully quote the definition of honorarium in 5 U.S.C. § 505(3).

13. Plaintiffs do not fully state the definition of honorarium contained in the Office of Government Ethics Regulations. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a). Plaintiffs' statement that receipt of payment is prohibited when the writing or speaking results in

no real or apparent conflict of interest with the employees' official duties is a legal conclusion, rather than a statement of fact, and is inconsistent with Congress' judgment that the receipt of honoraria generally creates an appearance of impropriety.

14. This is not a material statement of fact.

15. This is not a material statement of fact.

16. The statement that, before January 1, 1991, plaintiff NTEU Chapter 143 regularly published a newsletter is not supported by the record. Affiant Giunta states that, as a result of an inadequate level of voluntary participation by chapter members, the newsletter failed to publish regularly and was dropped altogether on several occasions, most recently about a year ago. Plaintiffs' Exhibit 12, ¶ 4.

17. The statement that the employee hired by Chapter 143 to write its newsletter is barred by the Ethics Reform Act from accepting compensation for producing the newsletter is a legal conclusion and is incorrect. The Ethics Reform Act, as interpreted by the Office of Government Ethics, does not prohibit federal employees from receiving compensation for producing or creating a newsletter, which is considered a publication made up of a number of individual articles and announcements and may also contain pictures and graphics, the total production of which includes not only writing, but editing, design and layout skills.

18. Plaintiffs' statement that Chapter 143 has been unable to publish its newsletter since January 1, 1991, to the extent it implies that the Ethics Reform Act is the cause of this inability, is inaccurate, for the reasons stated *supra*.

19. To the extent that "other expenses of a capital nature" includes college or post-graduate education, *see* Plaintiffs' Exhibit 11, ¶ 4 (Fishell—five or six years of theological education); Plaintiffs' Exhibit 15, ¶ 4

(Grant – 11 years of college and graduate school), the statement is not supported in the record or consistent with the first sentence of plaintiffs' paragraph 19. These educational expenses were not incurred in the course of writing or speaking.

20. Plaintiffs' statement that Crane took an extended leave without pay in order to pursue his research is inaccurate because it is incomplete. Plaintiff Crane also stated that he took as extended period of leave without pay to spend more time with his family. Plaintiffs' Exhibit 6, ¶ 3.

25. The statement that some plaintiffs and affiants cannot afford to continue writing or speaking, at least at current levels, without compensation is not supported by the statements cited. Declarant Gordon evidently can afford to continue writing or speaking at current levels without compensation as he is not now reducing his speaking activities. Plaintiffs' Exhibit 13, ¶ 15. Declarant Gordon stated that, if the inability to receive payment for speech becomes permanent, he will have to significantly reduce his speaking activities. *Id.* Affiant Shelton, in an affidavit dated December 15, 1990, stated that he was in the predicament of choosing between his job and his writing. Since he submitted his affidavit, Office of Government Ethics regulations have been issued which would permit Shelton to recover actual and necessary travel expenses for his writing, 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(4)). Because affiant Shelton has not submitted an updated affidavit, it is unknown what effect the Act and implementing regulations have on his writing activities.

Plaintiffs' statement that some plaintiffs have already or will soon abandon their unpaid expressive activity for other, paid part-time employment is not supported by the statements cited. Declarant Kennedy stated that, if the

honorarium provision is not struck down, she will be forced to close her professional writing business. Plaintiffs' Exhibit 19, ¶ 3. Declarant Hanna stated that she would rather devote her time and energy to projects for which she can still receive compensation, Plaintiffs' Exhibit 11, ¶ 11, and that preparatory time and travel time entailed in speaking are better spent on income producing efforts. Plaintiffs' Exhibit 11, ¶ 13. Neither declarant stated that they had already embarked on other, paid part-time employment.

28. Plaintiffs' statement that affiant Jackson will temporarily continue to write or speak without compensation in order to protect his credentials and with the intention of resuming compensated expression as soon as legally permitted is not supported in the record. Jackson's Declaration states that he continued writing for the *Post*, but does not say that he did so to protect his credentials. In addition, Jackson states that he would probably continue to lecture and write about dance without pay. Plaintiffs' Exhibit 17, ¶¶ 6, 7.

30. Except for the statement relating to plaintiff Hanna, none of the statements in this paragraph are supported by the record. Plaintiff Mark does not state that his career depends on continued publication of scholarly articles. Plaintiff Kennedy does not state that she writes to develop credentials for a planned career change. The remaining statements in the paragraph are similarly unsupported.

32. Plaintiffs' statement that some agency ethics officials have distributed incomplete information to employees is not supported in the record. Affiant Gordon asked his agency ethics official whether he could receive a payment for his lectures. Plaintiffs' Exhibit 13, Exhibit A. He did not inquire as to what expenses were recoverable and, therefore, the official's failure to respond to these

issues cannot be regarded as an incomplete response. Affiant Fager asked his agency eithics official whether he could receive an honorarium for a speech, but did not tell the officer that he agreed to deliver the speech prior to January 1, 1991, Plaintiffs' Exhibit 8, Exhibit A. The officials' response, based on only a partial statement of the relevant facts, cannot therefore be regarded as incomplete.

Respectfully submitted,

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Dated: May 20, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 90-2922 (TPJ), 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants submit the following Statement of Material Facts Not in Dispute in support of their cross-motion for summary judgment.

1. Plaintiffs in Civil Action 90-2922 are: the National Treasury Employees Union ("NTEU"), which represents a certified class of all "employees," as defined in regulations to be codified at 5 C.F.R. § 2636.102(c) and (d), below grade GS-16 who, but for 5 U.S.C. app. § 501(b), would receive "honoraria," as defined in 5 U.S.C. app. § 505(3);

NTEU Chapter 143; Jan Adams Grant and Thomas C. Fishell.

2. Plaintiffs in Civil Action 90-3044 are: Peter G. Crane, Richard Deutsch, Charles E. Fager, William H. Feyer, Robert A. Gordon, Dr. Judith L. Hanna, Dr. George J. Jackson, Sharon Kennedy, Eduard Mark, and Arnold A. Putnam.

3. Plaintiffs in Civil Action 90-2922 and 90-3044 and the certified class in Civil Action 90-2922 are employees of the Executive Branch of the federal government.

4. Defendants in both Civil Action 90-2922 and 90-3044 are the United States of America; Richard Thornburgh, the Attorney General of the United States; the Office of Government Ethics and Stephen D. Potts, Director of the Office of Government Ethics.

5. In the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Congress enacted legislation which prohibited all elected or appointed officers or employees of any branch of the federal government from accepting an honorarium over $1,000 per appearance, speech or article and from accepting over $15,000 in honoraria during any year.

6. In the Federal Election Campaign Act of 1976, Pub. L. No. 94-283, Congress raised the permissible limit on honoraria to $2,000 per speech, appearance or article and $25,000 annually. In Pub. L. No. 97-51, Congress eliminated the requirement that federal officers or employees accept no more than $25,000 in honoraria annually. *See* 2 U.S.C. § 441i (1988).

7. On November 30, 1989, Congress enacted the Ethics Reform Act of 1989, Pub. L. No. 101-194 (the "Act").

8. Title VI of the Act ("Title VI") amended § 501(b) of the Ethics in Government Act of 1978 to provide: "An individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. § 501(b).

9. The term "Member" means "a representative in, or a Delegate or Resident Commissioner to, the Congress." 5 U.S.C. app. § 505(1).

10. The term "officer or employee" means "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code). 5 U.S.C. app. § 505(2).

11. 5 U.S.C. app. § 505(b) amended 2 U.S.C. § 441i to limit its applicability only to Senators or officers or employees of the Senate.

12. Title VI took effect on January 1, 1991. 2 U.S.C. § 31-1 note.

13. The term "honorarium" means, in pertinent part, "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) . . ." 5 U.S.C. app. § 505(3).

14. An honorarium which is paid on behalf of any Member, office or employee to a charitable organization is deemed not to have been received by the Member, officer or employee. 5 U.S.C. app § 501(c). No payment to a charitable organization shall exceed $2,000 or be made to an organization from which the individual or a parent, sibling, spouse, child, or dependent relative derives any financial benefit. *Id.*

15. The Attorney General may bring a civil action against any individual who violates 5 U.S.C. app. § 501(b). The individual may be assessed a civil penalty of

not more than $10,000 or the amount of compensation, if any, whichever is greater. 5 U.S.C. app. § 504(a).

16. The Office of Government Ethics ("OGE") is authorized to issue rules and regulations implementing Title VI with respect to officers and employees of the executive branch. 5 U.S.C. app. § 503(2).

17. The OGE published interim final regulations implementing relevant portions of Title VI on January 17, 1991. 56 Fed. Reg. 1721 (to be codified at 5 C.F.R. § 2636.101 – .205).

18. The OGE and designated agency ethics officials are authorized to render advisory opinions as to whether specific conduct which has not yet occurred would violate any provision of Title VI. Any individual to whom such an advisory opinion is rendered and any other individual covered by Title VI who is involved in a fact situation which is indistinguishable in all material respects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction under 5 U.S.C. app. § 504(a). 5 U.S.C. app. § 504(b); *see* 56 Fed. Reg. 1723-24 (to be codified at 5 C.F.R. § 2636.103).

19. The OGE regulations provide that "honorarium" does not include the payment of money or things of value listed in 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(1)–(12)), which include: meals and other incidents of attendance, actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing of or publication of an article, actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, and compensation

for goods or services other than appearing, speaking or writing even though making an appearance or speech or writing an acticle may be an incidental task associated with provision of the goods or services.

20. OGE regulations define "appearance" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(b)) and exclude from the definition "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display."

21. OGE regulations define "speech" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(c)) and exclude from the definition "the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of appearance . . . It does not include the conduct of worship services or religious ceremonies."

22. OGE regulations define "article" at 56 Fed. Reg. 1726 (to be codified at 5 C.F.R. § 2636.203(d)) and excludes from the definition "works of fiction, poetry, lyrics or script."

23. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for producing a newsletter, which is considered a publication made up of a number of individual articles and announcements and may also contain pictures and graphics, the total production of which includes not only writing, but editing, design, and layout skills. *See* 56 Fed. Reg. 1725, 1726 (to be codified at 5 C.F.R. § 2636.203(a)(6); 5 C.F.R. § 2636.203(d)).

24. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees

from receiving compensation for conducting worship services or religious ceremonies. 56 Fed. Red. 1725 (to be codified at 5 C.F.R. § 2636.203(c)).

25. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for singing at weddings and other public forums. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(b)).

26. Prior to the enactment of Title VI, many declarants and plaintiffs bore considerable actual, capital and opportunity costs to prepare for and engage in writing articles, delivering speeches and making appearances. Plaintiffs' Exhibit 6, ¶¶ 3, 5 (Crane); Exhibit 7, ¶ 14 (Deutsch); Exhibit 11, ¶ 4 (Fishell); Exhibit 13, ¶¶ 13, 14 (Gordon); Exhibit 15, ¶ 4 (Grant); Exhibit 16, ¶ 12 (Hanna); Exhibit 18, ¶ 7 (Kennedy); Exhibit 19, ¶ 4 (Kennedy); Exhibit 20, ¶ 4 (Mark); Exhibit 21, ¶ 5 (Putnam); Exhibit 23, ¶ 5 (Vastine).

27. Prior to and following the enactment of Title VI, officiers and employees have not and are generally not permitted to engage in non-government work while on duty. *See* 5 C.F.R. § 735.205.

28. Many plaintiffs and declarants expended or were willing to expend the actual, capital and opportunity costs indicated in paragraph 26 without a contractual or other guarantee that their efforts would yield payments for speeches, articles or appearance. Plaintiffs' Exhibit 6, ¶ 7 (Crane); Exhibit 7, ¶ 14 (Deutsch); Exhibit 20, ¶ 4 (Mark).

29. Many plaintiffs and declarants received relatively small honoraria per speech, article or appearance. Plaintiffs' Exhibit 7, ¶ 7 (Deutsch—received $100 per article ten years ago); Exhibit 8, ¶ 2 (Fager); Exhibit 13, ¶ 3 (Gordon): Exhibit 16, ¶ 3 (Hanna); Exhibit 20, ¶ 3 (Mark); Exhibit 21, ¶ 3 (Putnam).

30. Many plaintiffs and declarants received relatively small amounts of honoraria annually. Plaintiffs' Exhibit 10, ¶ 8 (Fishell); Exhibit 14, ¶ 9 (Grant); Exhibit 17, ¶ 5 (Jackson); Exhibit 18, ¶ 4 (Kennedy).

31. When accounting for actual, capital and opportunity costs, many declarants and plaintiffs did not earn an economic profit on writing articles, giving speeches and making appearances.

32. Many plaintiffs and declarants have engaged in and now engage in writing and speaking for non-monetary reasons. Plaintiffs' Exhibit 6, ¶ 5 (Crane); Exhibit 7, ¶ 9 (Deutsch); Exhibit 13, ¶¶ 2, 14 (Gordon): Exhibit 17, ¶ 4 (Jackson); Exhibit 20, ¶ 5 (Mark).

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Dated: May 20, 1991

IN THE UNITED STATES DISTRICT COURT
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Civil Action Nos. 90-2922, 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
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PETER G. CRANE, ET AL.,
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UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), plaintiffs submit this Response to Defendants' Statement of Material Facts Not in Dispute. Plaintiffs agree with defendants that there are no material facts as to which there is a genuine issue of fact that need to be resolved in an evidentiary hearing. However, somone of the facts set forth in defendants' statement are inaccurate, unsupported or immaterial. Plaintiffs respond to those statements below. Those statements not specifically responded to are not in dispute.

2. The listing of plaintiffs in Civil No. 90-3044 is incorrect. Sharon Kennedy is an affiant, who is not a named plaintiff, in Civil No. 90-2922.

18. The statement that individuals who act in good faith in accordance with advisory opinions by the Office of Government Ethics and agency ethics officers shall not be subject to any sanction under 5 U.S.C. app. 504(a) is incorrect. The President, in signing the bill into law, stated that he viewed "as advisory the provisions allowing officials lacking executive powers to issue interpretative opinions purporting to insulate Federal employees from the consequences of potentially violative acts." 1989 U.S. Code Cong. & Admin. News 1225.

23. The statement that Title VI and implementing regulations do not prohibit the receipt of compensation for "producing a newsletter" is unsupported and immaterial. No named plaintiff is engaged in producing a newsletter as described by defendants. The government employee paid by plaintiff Chapter 143 to write articles for the Chapter's newsletter had no responsibility for editing, design, or layout.

24. The statement that Title VI and implementing regulations permit compensation for conducting worship services or religious ceremonies is incomplete. OGE regulations state that a minister may not accept payment "for offering a prayer at the opening of a convention or for delivering a sermon during a worship service conducted by another minister." 56 Fed. Reg. 1726, Sec. 2636.203(c), Example 2.

28. The statement that many plaintiffs and declarants expended or were willing to expend considerable actual, capital and opportunity costs connected with writing, speaking, or public appearances without a contractual or other guarantee that their efforts would yield payment for speeches, articles or appearances is immaterial. It is also

an overbroad generalization. Defendants cite to the affidavits of only three plaintiffs, one of whom stated that he was approached by editors to write articles. Had he been able to accept the offer, his expenses would have been incurred pursuant to a guarantee of payment. Deutsch dec. para. 10, 11. Certain other plaintiffs and affiants write or speak pursuant to contractual or other types of established commitments. Fager dec. para. 2; Feyer dec. para. 4, 6, 7; Fishell aff. para. 3, 5, 6. Others write pursuant to an on-going, albeit free-lance, relationship with a newspaper, magazine, or wire service. Shelton aff. para. 2, 3; Jackson dec. para. 2.

29. The statement that many plaintiffs and declarants received relatively small honoraria per speech, appearance or appearance is immaterial.

30. The statement that many plaintiffs and declarants received relatively small amounts of honoraria annually is immaterial.

31. The statement that many declarants and plaintiffs did not earn an economic profit from writing, speaking, or appearances when actual, capital and opportunity costs are included is immaterial and unsupported in the record.

Respectfully submitted,

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NATIONAL TREASURY EMPLOYEES UNION, *et al.*,

/s/ Gregory O'Duden

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3027 (TPJ)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants submit the following Statement of Material Facts Not in Dispute in support of their cross-motion for summary judgment.

1. Plaintiffs in this action are the American Federation of Federal Employees, AFL-CIO and David E. Hubler.

2. Plaintiff David Hubler is an employee in the Executive Branch of the federal government.

3. Defendants in this action are the United States of America; Richard Thornburgh, the Attorney General of the United States, and Stephen D. Potts, Director of the Office of Government Ethics.

4. In the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Congress enacted legislation which prohibited all elected or appointed officers or

employees of any branch of the federal government from accepting an honorarium over $1,000 per appearance, speech or article and from accepting over $15,000 in honoraria during any year.

5. In the Federal Election Campaign Act of 1976, Pub. L. No. 94-283, Congress raised the permissible limit on honoraria to $2,000 per speech, appearance or article and $25,000 annually. In Pub. L. No. 97-51, Congress eliminated the requirement that federal officers or employees accept no more than $25,000 in honoraria annually. *See* 2 U.S.C. § 441i (1988).

6. On November 30, 1989, Congress enacted the Ethics Reform Act of 1989, Pub. L. No. 101-194 (the "Act").

7. Title VI of the Act ("Title VI") amended § 501 (b) of the Ethics in Government Act of 1978 to provide: "An individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. § 501(b).

8. The term "Member" means "a representative in, or a Delegate or Resident Commissioner to, the Congress." 5 U.S.C. app. § 505(1).

9. The term "officer or employee" means "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code). 5 U.S.C. app. § 505(2).

10. 5 U.S.C. app. § 505(b) amended 2 U.S.C. § 441i to limit its applicability only to Senators or officers or employees of the Senate.

11. Title VI took effect on January 1, 1991. 2 U.S.C. § 31-1 note.

12. The term "honorarium" means, in pertinent part, "a payment of money or any thing of value for an appear-

ance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) . . ." 5 U.S.C. app. § 505(3).

13. An honorarium which is paid on behalf of any Member, office or employee to a charitable organization is deemed not to have been received by the Member, officer or employee. 5 U.S.C. app. § 501(c). No payment to a charitable organization shall exceed $2,000 or be made to an organization from which the individual or a parent, sibling, spouse, child, or dependent relative derives any financial benefit. *Id.*

14. The Attorney General may bring a civil action against any individual who violates 5 U.S.C. app. § 501(b). The individual may be assessed a civil penalty of not more than $10,000 or the amount of compensation, if any, whichever is greater. 5 U.S.C. app. § 504(a).

15. The Office of Government Ethics ("OGE") is authorized to issue rules and regulations implementing Title VI with respect to officers and employees of the executive branch. 5 U.S.C. app. § 503(2).

16. The OGE published interim final regulations implementing relevant portions of Title VI on January 17, 1991. 56 Fed. Reg. 1721 (to be codified at 5 C.F.R. § 2636.101–.205).

17. The OGE and designated agency ethics officials are authorized to render advisory opinions as to whether specific conduct which has not yet occurred would violate any provision of Title VI. Any individual to whom such an advisory opinion is rendered and any other individual covered by Title VI who is involved in a fact situation which is indistinguishable in all material respects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any

sanction under 5 U.S.C. app. § 504(a). 5 U.S.C. app. § 504(b); *see* 56 Fed. Reg. 1723-24 (to be codified at 5 C.F.R. § 2636.103).

18. The OGE regulations provide that "honorarium" does not include the payment of money or things of value listed in 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(1)–(12)), which include: meals and other incidents of attendance, actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing of or publication of an article, actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, and compensation for goods or services other than appearing, speaking of writing even though making an appearance or speech or writing an article may be an incidental task associated with provision of the goods or services.

19. OGE regulations define "appearance" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(b)) and exclude from the definition "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display."

20. OGE regulations define "speech" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(c)) and exclude from the definition "the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of appearance . . . It does not include the conduct of worship services or religious ceremonies."

21. OGE regulations define "article" at 56 Fed. Reg. 1726 (to be codified at 5 C.F.R. § 2636.203(d)) and excludes from the definition "works of fiction, poetry, lyrics or script."

22. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for any article accepted for publication prior to January 1, 1991, or for any speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(12)).

23. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for reprinted if articles if the original article was written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991 and that contract provided that the employee would be compensated for any reprinted articles that might subsequently be published. *See* 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(12)).

Respectfully submitted,

STUART M. GERSON
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JAY B. STEPHENS
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/s/ Mary E. Goetten
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Attorneys for Defendants

Dated: May 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-3027 (TPJ)

Consolidated With CA No. 90-2922, CA No. 90-3044

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), plaintiffs submit this Response to Defendants' Statement of Material Facts Not in Dispute. As defendants recognize, there are no material facts relating to the issues before this Court as to which there is a genuine issue necessary to be tried. However, certain statements in Defendants' Response to Plaintiffs' Statement of Material Facts are either inaccurate, unsupported or immaterial. Plaintiffs reply to those statements below:

2 and 6. Defendants' characterization of plaintiffs' synopsis of Title VI as inaccurate is not entirely correct. While 5 U.S.C. app. § 505(2) does exclude Senate and special government employees from the definition of "employee" in 5 U.S.C. app. § 505(b), the exceptions are

minuscule components of the vast federal workforce, all of whom are currently subject to the honorarium restriction. In addition, contrary to defendants suggestion, plaintiffs did not state that the statutory penalty of a $10,000 fine was mandatory. The fact remains, however, that the statute does prescribe this severe sanction for violation of the honorarium provision.

7. The "interim" regulations implementing 5 U.S.C. § 501-505 at 56 Fed. Reg. 1721 are not final. In promulgating these regulations, the Office of Government Ethics expressly requested comments by interested parties for consideration "in formulating a final rule." 56 Fed. Reg. 1722.

8. The interim regulations were issued without explanation as to the need or evidentiary support for such restrictions on the expressive activities of federal employees.

18. Plaintiff Hubler's contact with editors is a direct consequence of his efforts to publish his written articles. In Mr. Hubler's case, absent the receipt of income for publication, he will no longer be able to engage in the type of writing which he enjoys..

Respectfully submitted,

/s/ Mark D. Roth

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/s/ Anne M. Wagner

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STATEMENT OF MATERIAL FACTS OVER WHICH THERE EXISTS NO GENUINE DISPUTE

Pursuant to Local Rule 108(h), and in support of their motion for summary judgment, plaintiffs submit the following statement of material facts over which there can be no genuine dispute:

1. In November, 1989, Congress enacted Title VI of the Ethics Reform Act of 1989, Pub. L. 101-194, ("the Act"), which became effective January 1, 1991.

2. Title VI of the Act, amending Title V of the Ethics in Government Act of 1978, prohibits the receipt of honoraria by all federal employees, under the pain of civil prosecution by the Attorney General and a penalty of $10,000. 5 U.S.C. app. § 504.

3. Specifically, Title VI amends § 501(b) and (c) of the earlier legislation to read:

(b) HONORARIA PROHIBITION.—An individual may not receive any honorarium while that individual is a Member, officer or employee.

(c) TREATMENT OF CHARITABLE CONTRIBUTIONS.—Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed $2000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

4. The Act defines "honorarium" as "a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) . . . ." 5 U.S.C. app. § 505(3).

5. An "officer or employee" is therein defined as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (b) any special Government employee (as defined in section 202 of title 18, United States Code)." 5 U.S.C. app. § 505(2).

6. Under the Act, *any* federal employee who has received payment or thing of value for *any* speech, appearance, or article may be fined up to $10,000 pursuant to a civil action brought by the Attorney General. 5 U.S.C. app. § 504.

7. On January 17, 1991, the Office of Government Ethics, pursuant to authority established under 5 U.S.C. app. § 503, published proposed regulations construing, in part, the honorarium ban of Title VI of the Act. 56 Fed.

Reg. 1721 (Jan. 17, 1991), Plaintiffs' Exhibit ("Pls.' Ex") A.

8. Without explanation, the regulations include certain expressive activities within the ban's scope, while excluding others. For instance, an employee may receive payment for a fictional, but not a nonfictional, article. 56 Fed. Reg. at 1726. "Appearance" means "attendance at a public or private conference, meeting, hearing, event or other gathering," but does not include "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 56 Fed. Reg. at 1725.

9. The American Federation of Government Employees, AFL-CIO, ("AFGE") is a federal employee union representing "employees," as defined in Title VI. Affidavit of Allen Kaplan, Secretary-Treasurer of the American Federation of Government Employees, AFL-CIO, par. 3, Pls.' Ex. B.

10. David Hubler, a member of the bargaining unit represented by AFGE Local 1812, is currently employed by the Voice of America ("VOA" or "agency") as a GS-13 features writer. Affidavit of David E. Hubler ("Hubler Aff."), par. 1, Pls.' Ex. C.

11. Hubler has been employed by VOA for thirteen years and has been a federal employee for twenty-four years. Hubler Aff., par. 1. His work for the agency involves writing book reviews and pieces about American life for broadcast over VOA International radio. *Id.*

12. One of Mr. Hubler's interests, which he pursues during his off-duty hours, is writing magazine and newspaper articles on travel and other topics on a free-lance basis. Hubler Aff., par. 2.

13. Hubler has been engaged in this work since 1979 with the knowledge and approval of his supervisors at VOA. Hubler Aff., par. 2-3.

14. David Hubler receives approximately $500 to $1,500 per article, depending upon the length of the article. Hubler Aff., par. 4. In any given year, he earns an average of $2,000 as a result of his off-duty writing. *Id.*

15. Previous to becoming aware of the Ethics in Government Act of 1989, he had every expectation of continuing to publish articles similarly unrelated to his duties as a VOA employee and receiving payment for such publication after January 1, 1991. Hubler Aff., par. 5.

16. At least one article written in 1990 is scheduled to be published in March, 1991. Hubler Aff., par. 5. Moreover, some of his previously published articles will be reprinted after January 1, 1991, for which he is scheduled to receive payment. *Id.*

17. The expenses which Mr. Hubler incurs in order to pursue his off-duty writing extend beyond those that merely cover transportation and lodging. Hubler Aff., par. 7. A prohibition against receipt of such expenses will impair his ability to engage in the type of activities about which he writes. *Id.*

18. During the ten years that Hubler has been travel writing, he has cultivated and developed credibility with, and a reputation among, the community of editors who determine whether his work gets published. Hubler Aff., par. 8. The Act's prohibition will effectively remove him from contact with this community which will, in turn, adversely affect his ability to write and publish travel articles now and upon his retirement from federal service for which he is eligible in September, 1991. *Id.*

Respectfully submitted,

/s/ Mark D. Roth

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/s/ Anne M. Wagner

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DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants submit this Response to Plaintiffs' Statement of Material Facts Not in Dispute. We do not believe there are any material facts as to which there is a genuine issue necessary to be tried. However, some of the facts set forth in plaintiffs' Statement are either inaccurate or unsupported. Defendants respond to these statements of fact below. Those facts not specifically responded to are not disputed.

2. Plaintiffs' synopsis of Title VI is inaccurate. 5 U.S.C. app. § 501(b), which is only part of Title VI, does not prohibit the receipt of honoraria by all federal employees, but only by Members, Officers or employees as defined in 5 U.S.C. app. §§ 505(1), (2). Plaintiffs also inaccurately paraphrase the civil penalty provision. That provision, 5 U.S.C. § 504(a), does not require that violators of § 501(b) be assessed a civil penalty of $10,000. Rather, the provision states that "the court in which such [civil penalty] action is brought may assess against such individual a civil penalty of not more than $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater."

6. Plaintiffs' statement that any federal employee may be subject to a civil penalty action is inaccurate. As stated in ¶ 2, only Members, officers or employees as defined in 5 U.S.C. §§ 505(1) and (2), rather than every federal employee, are subject to § 501(b).

7. Plaintiffs' statement that, on January 17, 1991, the Office of Government Ethics published proposed regulations is inaccurate. The regulations published on January 17, 1991 were interim regulations with a request for comments. 56 Fed. Reg. 1721.

8. Plaintiffs' statement that the regulations were issued without explanation is inaccurate. The preamble to the regulations is at 56 Fed. Reg. 1721-22 (Jan. 17, 1991). Specifically, it explains that the definitions of appearance, speech, and article are similar, but not identical, to definitions contained in the Federal Election Commission regulations, 11 C.F.R. § 110.12, which implement the honoraria restrictions in 2 U.S.C. § 441i.

13. The statement that Hubler has been engaged in free-lance writing with the approval of his supervisors at VOA is not supported by the record. Hubler's affidavit states only that his supervisors never expressed concern to him that his off-duty activities affected his duties as a federal employee. Hubler Aff., ¶ 3.

16. The statement that, at least one article written by Hubler in 1990 is scheduled to be published in March, 1991, is not accurate. It is now May, 1991 and that article either was or was not published. Plaintiffs do not say

whether the article was in fact published or not, or whether Hubler was paid for the article.

18. The statement made in the second sentence in the paragraph is not supported. The Act's prohibition may only effectively remove plaintiff Hubler from contact with his community of editors if he chooses not to write articles. Hubler has not alleged that he has chosen not to write articles and thus is not effectively removed from contact with these editors.

Respectfully submitted,

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Assistant Attorney General

JAY B. STEPHENS
United States Attorney

/s/ Mary E. Goetten
MARY E. GOETTEN

/s/ Jeffrey S. Gutman
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Dated: May 22, 1991

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.,
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DECLARATION OF ALLEN H. KAPLAN

I, ALLEN H. KAPLAN, hereby declare as follows:

1. I am the National Secretary-Treasurer of the American Federation of Government Employees, AFL-CIO. I have occupied that position since August 1986.

2. The American Federation of Government Employees, AFL-CIO (hereafter "AFGE"), is a non-profit, unincorporated association (labor organization) having its principal place of business at 80 F Street, N.W., Washington, D.C. 20001.

3. AFGE affiliated locals and councils are the exclusive bargaining representatives of approximately 690,000 federal employees. The employees within bargaining units represented by AFGE perform a wide variety of functions reflective of the broad expanse of federal government operations. For example, AFGE represents

units of nurses, fork lift operators, grave diggers, border patrol agents, clerk typists, federal protective officers, meat inspectors, and cowboys.

4. AFGE represents the employment interests of these and other federal employees throughout the world by negotiating collective bargaining agreements, filing unfair labor practice charges, lobbying Congress on matters affecting federal working conditions, pay and benefits, and litigating individual and collective rights of employees in administrative forums and federal and state courts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and, if called to do so, I would so testify.

Executed this 6th day of May, 1991.

/s/ Allen H. Kaplan
ALLEN H. KAPLAN
National Secretary-Treasurer

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AFFIDAVIT OF DAVID E. HUBLER

1. My name is David E. Hubler. I am currently a GS-13 career employee of the Voice of America ("VOA"), a component of the United States Information Agency, located at 330 Independence Avenue, S.W., Room 3446, Washington, D.C. 20547. I am also a member of the bargaining unit represented by Local 1812 of the American Federation of Government Employees. My duties involve writing book reviews and pieces about American life for broadcast over the Voice of America international radio. I have been employed by the VOA for 13 years and have been a federal employee for 24 years.

2. One of my interests unrelated to my employment which I pursue during my off-duty hours is writing. I have been writing and publishing magazine and newspaper articles on travel and other topics on a free-lance basis

since 1979. My travel writing has focused primarily on areas in the Caribbean and Florida.

3. I have been engaged in this off-duty work with the knowledge of my supervisors at VOA who never expressed concern to me that my off-duty activities in any way affected my duties as a federal employee.

4. I receive approximately $500 to $1,500 per article, depending upon the length of the article. In any given year, I earn an average of $2,000 as a result of my off-duty writing. A listing of published articles which I have written accompanies this affidavit.

5. Previous to becoming aware of the Ethics in Government Act of 1989, I had every expectation of continuing to publish articles similarly unrelated to my duties as a Voice of America employee and receive payment for such publication after January 1, 1991. In 1990, I signed a contract to deliver an article by December 1990 for publication in the March 1991 edition of *New Dominion* Magazine on local breweries. I have not yet received payment for that article. One of my articles that originally appeared in a 1990 volume of *Caribbean Travel and Life,* and for which I was paid in 1990, was reprinted in the January/February 1991 issue of the American Eagles' inflight magazine. At least two other articles which I wrote are scheduled to be reprinted in the June/July 1991 issue of the American Eagles' inflight magazine and in the 10th Anniversary issue of *Islands* magazine in June 1991. Payment for such reprints normally occurs one month after the cover date of the volume in which the article appears.

6. The Act's prohibition against receipt of payment for my writings will effectively suppress my ability to write and publish articles. The normal procedure for publication of the type of article I write is that I call or send a query letter to a publication which may be interested in my idea for an article. If the publisher agrees, I will be asked

to sign a contract for such an article, with payment only upon acceptance or publication of the articles. Consequently, payment is not rendered as compensation for the travel expenses necessarily incurred in creating the article, but is nevertheless essential to my being able to underwrite such expenses.

7. Moreover, the expenses incurred in travel writing, for which I receive payment, extend beyond those that merely cover transportation and lodging. A prohibition against receipt of such expenses will impair my ability to engage in the type of activities about which I write.

8. During the 10 years that I have been travel writing, I have cultivated and developed a reputation among the community of editors who determine whether my work gets published. The Act's prohibition will effectively remove me from contact with this community which will, in turn, adversely affect my ability to write and publish travel articles now and upon my retirement from federal service for which I am eligible in September, 1991.

I declare under penalty of perjury that all of the information contained in this affidavit is true and correct to the best of my knowledge.

Date: May 7, 1991

/s/ David E. Hubler

DAVID E. HUBER

PLAINTIFFS' EXHIBIT F

United States
OFFICE OF GOVERNMENT ETHICS
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

December 12, 1990

The Honorable Trent Lott
U.S. Senate
487 Senate Russell Office Bldg.
Washington, D.C. 20510-2403

Dear Senator Lott:

This is in response to your recent letter requesting that we review the status of Mr. David E. Hubler with regards to the honoraria ban contained within the Ethics Reform Act of 1989 (the Act), Pub. L. No. 101-194, § 601, 103 Stat. 1716, 1760-63 (1989). We had hoped that legislation introduced in the last days of the 101st Congress would have made our response a more positive one. Unfortunately, as mentioned later, that did not occur.

According to the information that you have provided to us, Mr. Hubler is full-time features writer for the Voice of America.[1] In his spare time Mr. Hubler is a freelance writer and novelist who has published two books and numerous magazine and newspaper articles, mostly travel and profile articles. Mr. Hubler also teaches freshman composition at the Annandale campus of the Northern Virginia Community College. Because of these outside activities, Mr. Hubler is very concerned over the effects of

[1] The information contained in this letter is derived from Mr. Hubler's letter to your office dated September 21, 1990.

the honoraria ban on his situation. Because his teaching involves lecturing for compensation and also grading and critiquing papers, Mr. Hubler wishes to know whether he will be able to continue this activity under the terms of the ban. In addition to his personal concerns, Mr. Hubler also believes that the Act, which he describes as "egregious legislation," has an unfair impact on the thousands of federal employees who write professionally. We concur with the concern expressed by Mr. Hubler over the effects of the honoraria ban on federal employees.

The new prohibition against the receipt of honoraria, contained in section 601(a) of the Act, defines the term "honorarium" as "a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed." Pub. L. No. 101-194, § 601(a), 103 Stat. 1716, 1762 (1989). This section will become effective on January 1, 1991. *Id*, § 603.

This prohibition will bar all Government employees from receiving honoraria for an appearance, speech or article even if the activity is not related to the employees' official duties. As Mr. Hubler recognizes in his letter, this ban will generally prevent him from writing for a publication for a fee. We note, however, that the honoraria ban will not prevent him from publishing a book; such an activity will not be considered publication of an "article" under the terms of the honoraria ban. We also note that the ban will not prevent Mr. Hubler from receiving compensation for teaching a course at an accredited educational institution such as the Northern Virginia Communi-

ty College. Such activity will not be considered an appearance or speech under the honoraria ban.[2] The honoraria ban will, however, significantly curtail Mr. Hubler's ability to derive outside income from his writings, even if these writings have no connection with his position with the Voice of America.

We believe that the honoraria ban will place an unnecessary hardship on government employees. I fully support the goal of reducing conflicts of interest and actual or apparent misuse of government employment. I have no reason to believe, however, that this aim has not been achieved by already existing restrictions governing the outside activities of executive branch employees. The executive branch has long-established regulations that prohibit executive branch employees from engaging in outside activities that are not compatible with the full and proper discharge of the duties and responsibilities of their Government employment. Executive Order 12674, § 101(j) (1989); 5 C.F.R. § 735.203(a); *see also* Executive Order 11222 (1965), § 202 (superseded by E.O. 12674). Incompatible activities include the acceptance of a fee or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest, 5 C.F.R. § 735.203(a)(1), or any activity that may result in or create the appearance of using public office for private gain, Executive Order 12674, § 101(g); 5 C.F.R. § 735.201a(a). High-level officials are subject to additional restrictions. *See* 5 C.F.R. § 735.203(c); Exec.

[2] For your information we are enclosing an OGE memorandum (dated November 28, 1990) interpreting the honoraria ban and the outside earned income and employment restrictions contained in the Act. This memorandum also includes some discussion over the scope of the terms "appearance, speech or article" for the purposes of the honoraria ban.

Order 12674, § 102. Executive branch employees are also subject to a criminal statute, 18 U.S.C. § 209, prohibiting them from accepting anything of value as compensation for or as a supplement to the salary which they receive for their government duties. If generalized, the test under all of the various statutes and regulations in the executive branch for acceptance of an honorarium is, and will be through December 31, 1990, the following:

> (1) Is the honorarium offered for carrying out government duties?
>
> (2) Is the honorarium offered to the government employee or family member because of the official position held by the employee?
>
> (3) Is the honorarium offered because of the government information that is being imparted?
>
> (4) Is the honorarium offered by someone who does business with the employee in his or her official capacity?
>
> (5) Were any government resources or time expended by the employee to produce the materials for the article, speech or appearance?

If the answer to all of these questions is no, then an offered honorarium is acceptable, although it cannot exceed $2000.

We believe that the presently existing restrictions have adequately protected the Government against the actual or apparent misuse of government employment by executive branch employees while allowing such employees some freedom of action. The total ban on honoraria in the Ethics Reform Act will stop that balancing of interests. This Office is therefore of the opinion that the goals of this section could have been achieved in a way that would impose less of a burden upon Government employees.

This result could still be accomplished if the statutory language is amended so that the prohibition attaches only when there is some nexus between the source of or the reason for the honoraria and an individual's official duties. Such a prohibition would bar employees from receiving honoraria that may create an actual or apparent conflict of interest while permitting employees to continue to receive honoraria where no actual or apparent conflict of interest exists. However, although the Senate added language to H.R. 2431 on October 26, 1990 which would amend the honoraria restriction in a manner that would have focused it on matters related to government service, the House did not act on the bill before adjourning. We expect that the issue will be raised early in the 102nd Congress.

If you have any further questions concerning the issues discussed in this letter, please feel free to contact me or my staff at 523-5377.

Sincerely,

/s/ Stephen D. Potts

STEPHEN D. POTTS
Director

Enclosure:
As stated

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

SUPPLEMENTAL AFFIDAVIT OF CHARLES GIUNTA

1. I am an employee of the U.S. Customs Service in El Paso, Texas, Chief Steward and former President of NTEU Chapter 143, and President of NTEU District 16. After learning of this suit, I contacted David Klein, an NTEU attorney, to inform him that Chapter 143 was unable to find a qualified writer willing to work on its newsletter without pay after the previous writer, a Customs employee, became ineligible to accept compensation for his writing by reason of section 501(b) of the Ethics Reform Act of 1989. After this discussion, NTEU Chapter 143 became a party to this litigation, and I filed my previous affidavit in this case, explaining Chapter 143's predicament.

2. I understand that in this litigation, the government has suggested that our former writer could continue to write for the newsletter because producing a newsletter does not fall within the meaning of the ban on compensa-

tion for writing contained in section 501(b). Although I believe my previous affidavit made it clear that our writer was paid to write articles for the newsletter, and not to "produce" the entire newsletter, I wish to clarify that matter here in case any ambiguity remains.

3. Our former paid writer wrote most, but not all, of the articles in the newsletter. Other employees would occasionally submit articles for publication. Our former writer was not responsible for editing, arranging, laying out, printing, or producing the newsletter. Rather, he submitted typed copy to me. This copy would be retyped by a secretary, on NTEU time, using the Chapter's word processing equipment. I then personally edited the articles to ensure correct spelling and grammar. After I finished editing the articles, I selected the typeface and arranged and laid out the newsletter, using the Chapter's Xerox Ventura desktop publishing software. This required several evenings of my time each month. Then I sent the disk to a private contractor who laser-printed the newsletter. Our former writer was unfamiliar with the technology and software necessary to perform these activities, and performed no task other than writing the articles themselves.

I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 5/28/91

/s/ Charles Giunta
CHARLES GIUNTA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

SUPPLEMENTARY AFFIDAVIT OF JAN ADAMS GRANT

1. I am an individual plaintiff in this litigation, and have filed a previous affidavit dated December 3, 1990. I am an Internal Revenue Service employee and a part-time speaker and writer of articles and books on environmental subjects.

2. As a speaker and writer, I am always paid for my public appearances or writing. I am not an employee of any of the persons or organizations that pay me for my expressive activity.

3. In the period since January 1, 1991, the effective date of the provision of the Ethics Reform Act which prohibits the acceptance of compensation for certain categories of writing, speaking and public appearances, I have been forced to curtail my First Amendment activities. I have stopped sending out query letters seeking publication of my written work, because I can no longer accept compensation for it under the terms of the Ethics Reform Act and implementing regulations. I have also stopped seeking opportunities to give paid addresses. I expect to

refrain from these expressive activities as long as the ban on compensated speech and writing remains in effect.

4. I believe that I am entitled to compensation for the time and effort I spend in researching and preparing speeches and articles. The expenses associated with this do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable under the Ethics Reform Act. I spent eleven years in college and graduate school obtaining bachelor's and master's degrees in geology and geophysics at considerable personal expense. I have invested approximately $2000 in word processing equipment. I spend several hundred dollars annually subscribing to publications and purchasing literature relevant to my field of expertise, without which I feel I would be less informed and less qualified as an author. The Ethics Reform Act would force me to absorb these capital costs permanently, and to forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

5. While the inability to defray my capital investment in my part-time speaking and writing activities is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially reduced by the ban on compensated expression. The time I spend researching and writing articles, and preparing and delivering speeches, could readily be invested in a profitable activity. For example, I have an associate's degree in engineering graphics and have, in the past, earned money doing architectural drafting, an activity that, under current law, I could resume profitably instead of pursuing my writing career. Because I would be entitled to accept payment for these activities if the government has not determined to regulate this field, and because the law imposes economic disadvantages on me

for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities, and I find this singling out of my expressive activities for such a penalty extremely offensive.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 7-10-91

/s/ Jan Adams Grant

JAN ADAMS GRANT

SUPPLEMENTARY DECLARATION OF JUDITH L. HANNA

1. I am an Education Program Specialist for the United States Department of Education in Washington, D.C., and an individual plaintiff in this litigation. I submit this declaration to update the one I previously submitted in this case, which was filed with the Court as Exhibit 11 to Plaintiffs' Joint Motion for Summary Judgment.

2. By letter dated April 8, 1991, I wrote to my designated Agency Ethics Official seeking an advisory opinion on whether certain aspects of my writing and speaking activities are covered by the honoraria prohibition that took effect January 1, 1991. A copy of my letter is attached hereto as *Exhibit A*.

3. On or about May 30, 1991, I received a brief memorandum from Steven Y. Winnick, Designated Agency Ethics Official for the United States Department of Education. Mr. Winnick's memorandum acknowledges my April 8, 1991 letter. It then states: "Unfortunately, your posture as a plaintiff in a lawsuit against the United States regarding these provisions of the Act, renders me unable to respond to your inquiries. Accordingly, I am returning your letter." A copy of Mr. Winnick's memorandum is attached hereto as *Exhibit B*.

4. I have not received any further communications from the Department of Education regarding the issues and questions raised in my April 8, 1991 letter.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July , 1991.

/s/ Judith L. Hanna
JUDITH L. HANNA

EXHIBIT A

UNITED STATES DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
Programs for the Improvement of Practice
Research Applications Division

555 New Jersey Avenue, NW, Suite 504
Washington, D.C. 20208

202-219-2266

April 8, 1991

Mr. Steven Y. Winnick
c/o Dan Meyers
U.S. Department of Education
Ethics Official
400 Maryland Ave., SW (Room 4191)
Washington, D.C. 20202

Dear Mr. Winnick:

I would appreciate a ruling about two matters related to the honorarium prohibition and limitations on outside earned income and employment.

First, my consulting activities have been approved. They typically consist of reviewing and commenting on manuscripts and proposed projects and programs, or needs assessment and evaluation, within my areas of expertise. I have received between $100 and $1000 for such services. Are there limitations on these activities?

Second, concerning articles and speeches, is the writer's/speaker's time spent to prepare articles or speeches considered an expense? If the writer/speaker hired someone to do the preparation, e.g., research, for a speech or article, this would obviously be an expense. Is travel time to and from the site of a speech considered an

expense? What are the limits on the amount per hour and per day that may be considered for expenses? How does one document expenses?

Sincerely,

Judith Lynne Hanna, Ph.D.

EXHIBIT B

[SEAL]
UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL
400 Maryland Ave., S.W., Washington, D.C. 20202-2110

[MAY 30, 1991]

MEMORANDUM

To : Judith Lynne Hanna
Research Applications Division
Programs for the Improvement of Practice
Office of Educational Research and Improvement

FROM : Steven Y. Winnick
Designated Agency Ethics Official

SUBJECT: Advisory Opinion

This acknowledges your April 8, 1991 letter to me requesting an advisory opinion on two matters concerning the honorarium and outside earned income provisions of the Ethics Reform Act of 1989 (Act). Unfortunately, your posture as a plaintiff in a lawsuit against the United States regarding these provisions of the Act, renders me unable to respond to your inquiries. Accordingly, I am returning your letter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

AFFIDAVIT OF LAWRENCE W. FORD

1. I am employed by the United States Internal Revenue Service as a GS-12 appeals officer in the Richmond, Virginia, Appeals Office. I am a member of the National Treasury Employees Union ("NTEU") and a steward of NTEU Chapter 90. I have worked for the IRS for about 11 years.

2. On May 28, 1986, the IRS approved my request to engage in certain outside employment – specifically, to teach a commercial review course for certified public accountants, known as the Becker CPA Review Course. I have taught this course, along with two other individuals, since that time. I am not an employee of the Becker organization; rather, I operate as an independent contractor. Although I initially had a contractual arrangement with the organization, I now perform these services without a formal agreement. I receive approximately $2000 to $3000 a year from this teaching job.

3. My teaching responsibilities require me to lecture, conduct discussions, and comment on audio-visual

materials to the class members. The course involves multiple presentations, but is not part of a program of education or training sponsored or funded by any government, nor is it part of the regularly established curriculum of an institution of higher education.

4. I have been informed by the General Legal Services office of the IRS (letter attached to this affidavit) that Becker CPA course does not fall within one of the exceptions to the Ethics Reform Act ban on acceptance of honoraria for speaking. The IRS has withdrawn its approval to engage in this outside employment, although my manager indicated that he continued to believe my teaching enhanced the image and effectiveness of the IRS and was beneficial to me in improving my professional expertise (copy attached). Although the withdrawal of approval indicates to me that I cannot engage in the activity at all, I am going to argue to IRS that I should at least be permitted to teach the course for free.

5. I am in a very difficult position right now because I must continue teaching or I will soon be replaced by the Becker organization. In the short term, because I expect the ban on "honoraria" to be declared unconstitutional or eliminated by Congress, I would be willing to continue teaching without accepting my paycheck, in order to preserve my position with Becker. I am currently exploring with IRS and OGE whether I can defer acceptance of compensation or place my compenstion in an escrow account.

6. I wish to continue my employment. I welcome the income, and I enjoy the intellectual exercise of teaching the course. As IRS has acknowledged, the teaching keeps me abreast of accounting procedures. I would not have agreed to teach the course for free, and I will not continue teaching the course beyond the short-term immediate future without receiving compensation, because I view my work as a business arrangement with a profit-making

enterprise. If I could not receive compensation for this work, I would seek other outside employment for which I could lawfully accept compensation.

I declare under penalty of perjury that this statement is true and correct to the best of my knowledge and belief.

Date: June 11, 1991

/s/ Lawrence W. Ford
LAWRENCE W. FORD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

AFFIDAVIT OF STEVEN SHIPPEE

1. I am a captain in the United States Marine Corps, presently assigned to the Fourth Marine Expenditionary Brigade in Norfolk, Virginia as a logistics officer.

2. During the past ten years, I have written articles in my free time for publication in the *Marine Corps Gazette* and in the Naval Institute's *Proceedings,* a professional magazine for the sea services. I published an average of two articles a year in the *Marine Corps Gazette,* somewhat fewer in *Proceedings.* The articles were on topics such as tactics and strategy, the Constitution, the War Powers Act, retirement, and other personnel matters. The articles did not directly concern my responsibilities for the United States Marine Corps.

3. Until the effective date of the ban on receipt of compensation for articles contained in the Ethics Reform Act of 1989, I received compensation for articles submitted to the aforementioned publications. I was paid from $15 to $25 for articles published by the *Gazette* and approximately $20 for articles accepted for *Proceedings.*

4. In its January 1991 issue, the *Gazette* announced that, because of the Ethics Reform Act, it had adopted a policy of nonpayment with respect to those of its contributors who are military officers or civilian employees of the government (see attached copy of the relevant page). It continues to pay other contributors, including enlisted personnel, who are not covered by the ban on receipt of compensation. *Proceedings* has stated that it is paying only those who request compensation because of the Ethics Reform Act ban on receipt of "honoraria".

5. I will not write articles for publication unless I can accept compensation for my work. I have recently passed up opportunities to write, and I will not resume writing until the prohibition on receipt of compensation is struck down. I need the compensation to break even on my expenses. I find the writing to be enjoyable and worthwhile so long as I can at least defray some of my expenses; if I cannot accept the compensation, the effort is no longer worthwhile.

6. I have not explored with either magazine whether I could accept compensation to the extent of my actual expenses. I was not aware that I could accept reimbursement for my actual expenses until counsel for the National Treasury Employees Union so informed me. I have not seen any government circular or guideline memorandum informing me that I could accept such reimbursement. The only governmental guidance I have seen is a Naval Message from the Secretary of the Navy (SECNAV WASHINGTON DC//SN//121527ZDEC90), *proprio vigore* underscoring the new "prohibitions and limitations on outside earned income and employment". Accordingly, even if I could lawfully request payment from the magazines, I am and would be reluctant to do so. I find the prospect of keeping records of all my copying, research, and other expenses to be daunting, if not impossible. Moreover, I am hesitant about approaching the magazines to request compensation pursuant to a "loophole." As a military officer, I decline to act in a manner that appears contrary to the law.

I declare under penalty of perjury that this statement is true and correct to the best of my knowledge and belief.

Date: July 4, 1991

/s/ Steven Leon Shippee

STEVEN LEON SHIPPEE
CE 4TH MEB Nucleus
NAB Little Creek, VA 23520
(804) 464-8708

DECLARATION OF LESLIE A. HARRIS

1. I am Chief Legislative Counsel of the Washington Office of the American Civil Liberties Union. I make this declaration to inform the Court about recent developments in Congress on legislation that would amend the provision of the Ethics in Government Act of 1978 restricting the receipt of honoraria by federal government employees.

2. On November 27, 1991 Congress officially adjourned the first session of the 102d Congress. Congress will not begin the second session until January 3, 1992, but adjourns that same day and reconvenes on January 21, 1992.

3. Despite the best efforts of the American Civil Liberties Union, Common Cause, the National Treasury Employees Union and the Office of Government Ethics, among others, Congress adjourned without passing any legislation that would amend the provision of the Ethics in Government Act of 1978 that the plaintiffs in these consolidated cases challenge.

4. On November 25, 1991, the House of Representatives passed the Frank-Gekas compromise amendment, H.R. 3341. The Frank-Gekas amendment was supported by the ACLU, Common Cause, and the Office of Government Ethics.

5. The Senate has not agreed to the provisions of H.R. 3341. The primary opponent to the provisions of that bill has been Senator Byrd (D-W.Va.), who I have been informed objects to any provision that would allow legislative branch employees to receive honoraria for articles, speeches, and appearances. Because of Senate rules all that is needed to prevent a bill from reaching the Senate floor is the objection of one Senator. I have been told that Senator Byrd informed Senate Majority Leader Mitchell that he would object to the introduction to the floor of the provisions of H.R. 3341.

6. If the Senate should adopt a bill that comports with Senator Byrd's objection, the legislation would in my opinion still fail because the House would then have to vote on the new version of the bill and Representative Brooks (D-Tex.), Chairman of the House Judiciary Committee, is opposed to legislation that draws any distinction between executive branch and legislative branch employees.

7. The opposing positions held by Senator Byrd and Representative Brooks make it highly unlikely that Congress will adopt this legislation in an expedited fashion when in reconvenes in 1992. It is my opinion that legislation to amend the honoraria restriction will not even be considered by Congress until February of 1992 at the earliest and will not be enacted for some time after that, if at all.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 1991.

/s/ Leslie A. Harris

LESLIE A. HARRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

SECOND SUPPLEMENTARY AFFIDAVIT OF JAN ADAMS GRANT

1. I am an individual plaintiff in this litigation and have filed affidavits dated December 3, 1990, and July 10, 1991, in this matter. I am an Internal Revenue Service employee; before the effective date of the Ethics Reform Act of 1989, I was also a part-time speaker and writer of articles and books on environmental subjects.

2. Since January 1, 1991, when the ban on my receipt of compensation for my article writing and public speaking became effective, I have given no speeches and have written no articles for publication.

3. Because of the ban on receipt of "honoraria," I am not even being invited to deliver speeches without compensation. I was told by a representative of one organization that she had not invited me to make a speech on earthquake preparedness because she believed the law prohibited me from speaking in public, even without compensation. Her misunderstanding is commonplace, I have discovered; most people who have heard of the ban

assume that I am barred from engaging in the activity on any basis.

4. I understand that the U.S. Court of Appeals for the District of Columbia Circuit has suggested that my publishers could place my compensation in escrow, pending the outcome of the litigation. I approached one magazine editor with that idea and was greeted with laughter. The individual in question was the editor-in-chief of *Audubon,* a magazine for which I have written in the past. I asked the editor if he would agree to place my compensation in escrow. His comment was that federal workers were "a pain in the ass" and that he would deal instead with writers who would not cause him aggravation. He explained to me that he could not be bothered to deal with such an arrangement, for he had more than enough manuscripts from writers who would cause him no extra trouble. I viewed his laughing response to my question to be both humiliating and patronizing.

5. I would like to point out that publishers have not, in the past, been aware that I am a federal employee. The ironic effect of this law and the proposed escrow arrangement has been to force me to reveal that I am a federal employee; furthermore, because the publisher inevitably asks the follow-up question, I have been forced to disclose that I am an employee of the Internal Revenue Service. I find it puzzling that the practice of receiving honoraria could be viewed as creating the appearance of a conflict of interest when the individuals from whom I receive payments are not even aware that I am a federal employee. It is even stranger that my affiliation becomes known only when I ask, as directed by the Court of Appeals, that my payment be put in escrow pending my challenge to this law.

6. I estimate that it will take a full year, from the time the law is amended or struck down, before I will be able to

resume my article writing. It will take me many months to discover what subjects are topical and marketable and to do the research. I then estimate it will take six to eight months to write my query letters to publishers and to obtain a favorable response. I calculate that I would not be able to publish an article until 1993 if the ban were lifted now.

The longer the lapse of time before I can resume my article writing, the more difficult it becomes. My portfolio is becoming increasingly dated and my contacts in the business are fading. Editors and publishers look askance on writers whose last published articles are in 1990.

I declare under penalty of perjury that this statement is true and correct to the best of my knowledge and belief.

Date: 11-23-91

/s/ Jan Adams Grant

JAN ADAMS GRANT

SUPPLEMENTAL DECLARATION OF DR. GEORGE J. JACKSON

1. I make this supplemental declaration to inform this Court of likely adverse consequences I could suffer if the honorarium statute is still in effect at the end of this year. (*See* Exhibit A for previous declaration).

2. Since January 24, 1991, when I was informed by the *Washington Post* that I could write for them without getting paid, I have continued doing so. The *Post* agreed to this arrangement with the expectation that the honorarium statute would soon be either amended or declared unconstitutional. (*See* Exhibit B). Pursuant to the approach endorsed by the Court of Appeals, the *Post* apparently has retained in escrow the money that otherwise would have been paid to me for the articles I have written. As of today, this amounts to $1,865.

3. Allan M. Kriegsman, Chief Dance Critic of the *Post* recently communicated to me that at the end of this year, the *Post* will pay me everything that I would be entitled to were it not for the honorarium statute. It is my understanding that the *Post* will not continue to have an escrow account for me after the end of this year. Since the *Post* will give me the money whether I want to receive it or not, it is my understanding that even if I were to immediately deposit it into another escrow account, the IRS would consider it to be income received and I would have to pay taxes on it. More important, the Office of Government Ethics, according to its memorandum of June 24, 1991, would consider this to be money received, which would place me in violation of the honorarium statute. (*See* Exhibit C).

4. I am not sure of what can I do to avoid violating the honorarium statute, other than not cashing the check, which in any event might still place me in violation of

the statute. I also am unsure of what to do to avoid incurring tax liabilities even if I cannot enjoy the income received.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 1991

/s/ George John Jackson
DR. GEORGE J. JACKSON

EXHIBIT B

The Washington Post

202-334-7564

Feb. 8, 1991

TO WHOM IT MAY CONCERN:

For many years, Dr. George Jackson has regularly contributed to the dance coverage of The Washington Post, on assignment from myself and editors of the Style section. We consider Dr. Jackson's contributions invaluable.

Until the start of the current year (1991), he was, of course, compensated by the Post for this work. Since Jan. 1, however, he has not been receiving any payment, in accord with the recent legislation concerning "honoraria" for federal employees. He will continue to work for us, and will not be reimbursed for now, though it is our hope that pending legislative initiatives, and/or litigation, will restore unambiguous legality to the compensation he richly deserves.

Very truly yours,

/s/ Alan M. Kriegsman
ALAN M. KRIEGSMAN
Dance Critic

Exhibit C

[SEAL]

United States Office of Government Ethics
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

June 24, 1991

MEMORANDUM FOR DESIGNATED AGENCY ETHICS OFFICIALS, GENERAL COUNSELS AND INSPECTORS GENERAL

FROM: STEPHEN D. POTTS
DIRECTOR

SUBJECT: Placing Honoraria into Escrow Accounts

The Office of Government Ethics has received a number of inquiries regarding the legality of employees arranging to have honoraria placed in escrow pending the outcome of litigation contesting the constitutionality of the honorarium prohibition added by Title VI of the Ethics Reform Act of 1989. The three cases pending in the District Court for the District of Columbia have been consolidated and set for hearing on July 16, 1991.

Inquiries regarding the possible use of an escrow arrangement were prompted by the following language contained in the decision by the Court of Appeals for the District of Columbia Circuit denying plaintiffs' request for a preliminary injunction:

> . . . The appellants can put their compensation into escrow during the pendency of this litigation. If they succeed on their constitutional challenges, they can recover any honoraria paid into those accounts. Cf. *Hudson* v. *Chicago Teachers United, Local 1*, 708 F. Supp. 961, 963 (N.D. Ill. 1989) (holding that defendant's proposed escrow arrangement would 'adequately protect plaintiffs from the sort of irreparable harm that plaintiffs seek to avert'). If the Appellants fail, then they were never entitled to compensation in the first place.

National Treasury Employees Union v. *United States*, Nos. 90-5406 *et al.* (March 15, 1991).

Regulations implementing the statutory prohibition are contained in 5 CFR Part 2636 (56 FR 1721-1730, Jan. 17, 1991). Section 2636.203(e) provides that, unless it is paid to a charitable organization, an honorarium is "received" by an employee if it "is paid to another person on the basis of designation, recommendation or other specification by the employee."

It is our opinion that it would not violate the statute or the regulations for an employee to ask a person who has agreed to pay him an honorarium to establish an escrow account with provision for payment of the honorarium to the employee in the event of a final, nonappealable decision by a Federal court holding that the underlying statute is unconstitutional or in the event of legislation retroactively amending the statute to permit receipt of the escrowed honorarium. Where the payor rather than the employee places the honorarium into escrow with an agent selected by the payor, we would not view the escrowed honorarium as having been "received" by the employee until the conditions of the escrow are met and the honorarium is actually paid to the employee. Further, an agreement with the payor to pay an honorarium to the employee upon condition either that the court renders a final, nonappealable decision that the statute is unconstitutional or that the law is retroactively amended would not, in our opinion, violate the statute or regulations.

SUPPLEMENTAL DECLARATION OF ROBERT A. GORDON

1. I make this supplemental declaration to inform this Court of likely adverse consequences I could suffer if the honorarium statute is still in effect at the end of this year. (*See* Exhibit A for previous declaration).

2. As indicted in my declaration of April 11, 1991, in a good faith reliance on the opinion of the Court of Appeals, I opened an escrow account and deposited a check for $200 which I had received as an honorarium from the Maryland Institute of Art.

3. I have recently repeated my lecture entitled "The Glory and The Shame" and also have given a lecture on Black music. Both of these lectures were at the Maryland Institute of Art. I will soon receive payment of $100 for each of these lectures, and I intend to deposit it in the escrow account I opened last April.

4. My main concern at this point is that I am not sure if I have to claim what I have in the escrow account as income in my income tax return. If I do have to claim it as income, it seems unfair to me given that I have not been able to enjoy this income. Furthermore, if I do claim it as income and the law is never amended or invalidated, I am paying taxes on money to which I was never entitled.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 1991

/s/ Robert A. Gordon
ROBERT A. GORDON

SUPPLEMENTARY DECLARATION OF PETER G. CRANE

1. I submit this declaration in support of the Plaintiffs' Opposition to Defendants' Motion to Alter or Amend the Memorandum and Order of March 19, 1992. I have previously submitted a declaration in this case, dated April 11, 1991, which is attached at pages 15-20 of the Appendix (Volume I) to the Plaintiffs' Joint Motion for Summary Judgment.

2. When this lawsuit was filed in December 1990, and when the plaintiffs moved for summary judgment in April 1991, I was a lawyer employed by the Nuclear Regulatory Commission, Office of the General Counsel. My government grade level was GS-16.

3. On July 26, 1991, I resigned from my job with the NRC to accept a three-year appointment as a judge of the Nuclear Claims Tribunal in the Republic of the Marshall Islands. (Because I was to be employed by another government, I was required to resign from the NRC rather than take a leave of absence.) I assumed my judicial duties on August 23, 1991.

4. As explained in detail in my previous declaration (see ¶ ¶ 9-10), early last year I was investigated by my agency for allegedly violating the Ethics Reform Act of 1989. The investigation was prompted by an article I had written in late December of 1990 describing the various pernicious effects of the honoraria prohibition, which was published in the Op-Ed section of the *Washington Post* on January 6, 1991. On February 5, 1991, I received a check from the *Post* for $150, which I signed over to a charity. My agency then informed me that they believed I had violated the law and that the matter would be referred to the Justice Department and my supervisors for possible further action.

5. At the time I left the Washington, D.C. area to

assume my duties in the Marshall Islands, I had not heard from the Justice Department or my supervisors about any further action on my case. It was my understanding at that time that the Department of Justice was deferring action on my case while waiting to see whether Congress amended the law. Thus, notwithstanding that I had terminated my employment with the federal government, I had every reason to believe that I was still at risk of having proceedings instituted against me at any time, the result of which could be a civil penalty of $10,000.

6. For personal reasons, my family and I recently returned to the Washington, D.C. area from the Marshall Islands. Effective April 27, 1992, I will resume my employment as a lawyer with the NRC's Office of the General Counsel. As before, my government grade level will be GS-16.

7. To this day, I have not heard further from the Justice Department or my supervisors about any further legal action against me for my alleged violation of the honoraria prohibition.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 1992.

/s/ Peter G. Crane
PETER G. CRANE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

Civil Action No. 90-3027 (TPJ)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

Civil Action No. 90-3044 (TPJ)

PETER G. CRANE, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA,
DEFENDANTS.

ORDER

Upon consideration of the several plaintiffs' motions to alter or amend the Memorandum and Order of March 19, 1992, and the opposition thereto, and upon consideration of the defendants' motion to alter or amend the same, it is, this 17th day of April, 1992,

ORDERED, that the plaintiffs' several motions are denied; and it is

FURTHER ORDERED, that the defendants' motion is denied.

/s/ Thomas Penfield Jackson

THOMAS PENFIELD JACKSON
U.S. District Judge

[SEAL]

Internal Revenue Service

RULES OF CONDUCT

These Rules Supplement
the American Standards of Conduct
Department of the Treasury

A SUPERVISOR'S GUIDE
TO THE
RULES OF CONDUCT

The Guidance/Interpretation sections of this Guide are for Official Use Only.

Document (7-86)

Rule 224

Prohibited Activities

Rule 224.1

Service Rule

Employees may not engage in any outside employment or business activitiy which gives rise to a real or apparent conflict of interest. Such incompatible activities include:

(a) Legal Employment or Practice—Legal activities involving Federal, State, or local tax matters, or any matter in which the United States is a party.

(b) Appearance On Behalf of Taxpayers—Appearing on behalf of any taxpayer as an attorney, agent, or representative before any government agency, Federal, State, or local—in an action involving a tax matter except upon written authorization of the Commissioner of the Internal Revenue Service.

(c) Accounting—Engaging in accounting, the use, analysis, and interpretation of financial records when such activity involves tax matters.

(d) Bookkeeping—Engaging in bookkeeping, the recording of transactions, record making phase of accounting, when such activity is directly related to a tax determination.

(e) Preparation of Tax returns for Compensation—Engaging in the preparation of tax returns for compensation, gift, or favor.

Guidance/Interpretation

Official Use Only

The five (5) activities listed in this section all directly relate to the mission of the Service. Therefore, it is the Service's position that employees will not be permitted to engage

in them. These prohibitions are necessary to maintain public confidence in the integrity of the Service and its employees, and also to prevent allegations of conflict of interest and/or the abuse of official position. They address concerns peculiar to the IRS and are justified because of the Service's need for a positive public image. Numerous court decisions have acknowledged that the nature of the IRS mission is such that its employees can be held to strict accounability for their off duty activities. Any real or apparent involvement in activities that appears to compromise the integrity of Service employees could lead to serious consequences and a breakdown in the tax collection system.

Generally, permission to engage in any of the five (5) outside employment or business activities listed in this section will be denied. These prohibited activities are so clearly related to the mission of the Service that approval of such activities would normally not be in the best interest of the IRS.

Certain exceptions to the prohibitions in this section may be made based upon mitigating circumstances. The authority to permit exceptions to Section 224 is governed by Delegation Order No. 105, as revised. An example of a mitigating circumstance in which an exception might be allowed is a revenue officer who requests to represent his or her widowed mother in an audit. The employee previously prepared the mother's tax return without compensation. In this situation, as provided in Section 224.1(b), the employee must request from the Commissioner of the Internal Revenue Service written authorization to engage in this type of activity. If an employee makes such a request, it is imperative that: 1) the employee be instructed that the Commissioner is the only authorized approving official for these matters; and 2) the employee must fully set out the facts and circumstances necessary for the review of the request.

Overall, few exceptions to these provisions should be granted.

Rule 225

Restricted Activities

Rule 225.1

Service Rule

Employees must, prior to engaging in any outside employment or business activity, *either* with or without compensation, request and obtain written permission from the appropriate official. Subject to Section 224 such activities may be approved unless the activity would result in an actual or apparent conflict of interest. The following activities listed under Section 225:2 represent examples of areas of outside employment or business activity where an accrual or apparent conflict of interest will most likely occur. As such, particular attention should be paid to this guidance by employees in seeking approval.

Guidance/Interpretation

Official Use Only

Generally, any outside employment or business activity may be approved unless it will result in an actual or apparent conflict of interest. However, this section has been modified by a Memorandum of Agreement concerning the Rules of Conduct as Affects Outside Employment, dated May 1, 1986, (see Appendix 11) which states as follows:

> "With the exception of those activities listed under Section 224, Prohibited Activities, employees may engage in outside employment so long as they comply with any applicable procedural rule regarding requesting approval of outside employment and such outside employment will not:

> A) result in a conflict of interest or the appearance of a conflict of interest with his/her official duties and responsibilities; or
>
> B) bring discredit upon or lower public confidence in the Internal Revenue Service; or
>
> C) interfere with his/her efficient performance of his/her duties or his/her availability for duty."

The above standard represents the agreement with NTEU on Rules of Conduct as Affects Outside Employment and pertains only to bargaining unit employees. However, the Service has unilaterally decided to extend this standard to all outside employment or business activity requests of all Service employees.

The above standard is the exclusive measure to be used by a third party, e.g., an arbitrator, to determine whether management, in denying an outside employment/business activity request, acted appropriately. Therefore, in order that the Service maintain a consistent approach to outside employment/business activity, use of this standard in the review of all requests for such activity is recommended.

An activity not specifically prohibited in Section 224 will be evaluated on an individual basis using only the criteria in the above standard as the basis for approval or denial. For example, a supervisor should not routinely deny requests from professional employees to perform such part-time work as manual labor, driving a truck, janitorial maintenance, or gardening, even though he or she feels that those types of work are not appropriate for professional employees. These occupations, per se, are not in conflict with the standard. Supervisors may not impose additional standards.

There are situations where application of the standard may result in the denial of a request for outside employment. Examples are as follows:

1) A situation which may result in a conflict of interest or the appearance of a conflict of interest with an employee's official duties and responsibilities would be one in which a revenue officer in a small post of duty requests permission to work as a bill collector in the city's only collection agency.

2) A situation which may bring discredit upon or lower public confidence in the Internal Revenue Service is one in which a special agent requests permission to buy an interest in and manage a small hotel which is known in the community to be frequented by racketeers and others of ill-repute.

3) A situation which may interfere with an employee's efficient performance of duties or availability for duty would be one in which a Service Center data transcriber requests outside employment as a sales clerk in an all night drug store from 9:00 p.m. to 3:00 a.m. Monday through Friday. Such work hours would in all likelihood affect the employee's capacity to timely report for work and his or her ability to perform on an acceptable level.

References

Appendix 11, Memorandum of Agreement Concerning The Rules of Conduct As Affects Outside Employment; History and Interpretation of the Memorandum of Agreement.

Rule 225.2

Miscellaneous Outside Activities

Guidance/Interpretation

Official Use Only

Certain restricted activities are separately itemized in this section. This is done because the nature of these activities

is such that there is a strong likelihood that they may result in a real or apparent conflict of interest. As such, specific guidance is provided to employees seeking approval. These activities may be approved provided supervisors are assured that granting the approval will not lead to conflict of interest situations.

For example, because of the mission of the Service, there would generally be more potential for real or apparent conflict of interest if a tax auditor were to keep the books for several small specialty stores than if the same tax auditor were to be a part-time typist for a company specializing in typing term papers for college students. In the first instance, there is a greater possibility of conflict because bookkeeping can involve tax consequences. Therefore, specific guidelines are offered in Section 225.2(3) to assist supervisors in making their recommendations for approval.

It must be remembered that the only standard against which *all* outside employment/business activity requests will be judged (exclusively of those activities prohibited under Section 224) is that an employee may engage in any outside employment or business activity as long as he or she complies with the applicable procedural rules (Section 226) regarding requesting approval and such outside employment will not: a) result in a conflict of interest or the appearance of conflict of interest with his or her official duties and responsibilities; or b) bring discredit upon or lower public confidence in the Internal Revenue Service; or c) interfere with his or her efficient performance of duties or availability for duty.

Rule 225.2(1)

Speeches and Publications

(a) Public addresses and articles for publication, whether performed as an official duty or in a private

capacity, which deal with official operations or policies of the Service or the Department of the Treasury, must be cleared, in advance, in accordance with current Service directives. (See IRM 1(19)40.) Specific written permission in advance is necessary if the author is to be identified as a Service employee.

(b) Where any such activity is performed as an official duty, employees may not accept a fee, salary, honorarium, or other compensation from any source other than the Federal Government. Acceptance of reimbursement for travel, lodging, meals, or nominal courtesies is governed by Section 234.1.

(c) Where any such activity is performed in a private capacity, employees may accept a fee, salary,or other compensation which is reasonable and in accordance with these rules.

Guidance/Interpretation

Official Use Only

This section sets out the policy of the IRS concerning employee involvement in speaking or writing about Internal Revenue Service matters. Such activities include public addresses or published writings which deal with the operations or policies of the IRS or the Department of the Treasury. The IRS encourages its employees to participate in such activities; however, employees are subject to certain limitations and restrictions. One major limitation on these activities is that an employee must obtain prior clearance from the appropriate official before making such a speech or submitting an article. This applies whether the activity is done as an official duty or in a private capacity. Another major limitation is that if an employee performs the activity in an official capacity, he or she may not accept any fee, salary, honorarium, or other compensation for the speech or publication.

Criminal penalties are provided for government employees who receive compensation from a private source for their services to the government.

However, if, as an official duty, an employee participates in a tax forum or continuing educational program, he or she may accept payment or reimbursement of reasonable expenses for travel, lodging, and meals from state or local governments, or from organizations with IRC 501(c)(3) tax exempt status. (See also, Section 234, Gifts and Gratuities.)

References

26 USC 501 (c)(3), 18 USC 209; 5 CFR 735.203(b),(c), 31 CFR 0.735-39; IRM 1(19)40

FAIRNESS FOR OUR PUBLIC SERVANTS

The Report of

The 1989 Commission on Executive,

Legislative and Judicial Salaries

December 15, 1988

COMMISSION ON EXECUTIVE,
LEGISLATIVE AND JUDICIAL SALARIES

December 15, 1988

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On behalf of the fiscal 1989 Quadrennial Commission on Executive, Legislative and Judicial Salaries, I enclose herewith the Commission's report to you.

The Commission's principal function is to recommend appropriate salary levels for the top positions in the three branches of our government so that you may perform your statutory duty of making your own recommendations to the Congress as part of your proposed budget for fiscal 1990. Under the Quadrennial Commission statute, as amended in 1985, your recommendations take effect automatically unless and to the extent that within 30 days of your submission Congress agrees on a joint resolution disapproving part or all of such recommendations.

The Commission has concluded that the best way to measure the adequacy of present salary levels is to compare them with the salary levels which the President recommended to Congress in 1969, based on the report of the first Quadrennial Commission, and which Congress allowed to go into effect. We have found that present salary levels, stated in constant dollars, are approximately 35% *less* than the salary levels fixed for the same positions in 1969. Thus, our top federal officials have seen their salaries severely eroded by inflation while the compensation of all workers in the private sector has slightly *improved* over inflation during the same 29-year period.

As a result, many of our top Executive branch officials, members of Congress and federal judges find that they cannot remain in public office without imposing severe hardships on their families. One of our most distinguished judges, who was appointed before 1969, expressed concern that if he remained on the bench he would be unable to provide for his children the same educational opportunities that had enabled him to become a federal judge.

We have found that as a result of this salary erosion, the average period of service for top Executive branch officials has declined to 18 months. Many members of Congress are declining to stand for another term even though the reelection success rate of incumbents is better than 90%. More federal judges are resigning from the bench and returning to law practice than ever before.

We have also found that because their salaries are so inadequate, many members of Congress are supplementing their official compensation by accepting substantial amounts of "honoraria" for meeting with interest groups which desire to influence their votes. Albeit to a less troubling extent, the practice of accepting honoraria also extends to top officials of the Executive and Judicial branches.

Finally, we have also found that the inadequacy of present federal salaries severely limits the ability of all three branches to attract the most highly qualified individuals to enter the public service. The top AIDS researcher at NIH testified that because of present salary limitations, NIH has been unable for the last ten years to attract *any* qualified scientist to fill its most important senior research positions. Retired Chief Warren Burger informed us that he knew of one Court of Appeals vacancy that was turned down by ten qualified lawyers before anyone could be found to fill it.

Accordingly, the Commission unanimously recommends that salary levels for top federal officials be set at approximately the same amount in constant dollars as the salary established for the same positions in 1969, with appropriate adjustments to maintain current relationships among the various positions. We further recommend that Congress enact legislation abolishing the practice of accepting honoraria in all three branches. We are advised by the Office of Management and Budget that these salary increases will be offset by other savings in personnel costs.

We appreciate the opportunity of serving on the Commission. We believe the time has come to pay fair salaries to our highest federal officials, and that fairness to them is in the national interest of us all.

Sincerely,

/s/Lloyd N. Cutler

LLOYD N. CUTLER
Chairman

REPORT OF THE 1989 QUADRENNIAL COMMISSION

Table of Contents

PREFACE

"A public office is a public trust."

Senator Charles Sumner, 1872

The public interest is best served when public offices are filled by the most capable and conscientious citizens willing to assume the burden. No qualified citizen should be deterred from serving in public office by adequate levels of compensation. While public salaries need not match private salaries dollar for dollar, they should not be so low that public servants are asked to forego major educational and quality of life opportunities for their families that would be available to the same highly qualified individuals in private life.

Public service carries with it many well-known and broadly accepted burdens: invasion of individual and family privacy; meticulous reporting of all financial holdings and activities; adherence to a strict code of ethical behavior while in office; restrictions on personal conduct after returning to private life; the risk of unfair accusation of having violated any of the foregoing; and the daily weight of responsibility for decisions that affect millions of other citizens. But at present the heaviest burden of all is the huge disparity between federal pay and the pay for private sector positions requiring comparable skills.

Most who seek or accept high public office do so despite rather than because of the salaries these positions pay. Much more important motivations are the pride, prestige, and privilege of service, and the opportunity to contribute to the greater public good.

The initial decision to serve, however, comes more easily than remaining in service for an extended period. Levels of compensation in the private sector have more than kept

pace with inflation over the past twenty years. But the levels of salaries of high federal officials are now only about 65-70% in constant dollars of what their 1969 salaries were for the same positions. Federal judges are resigning their lifetime appointments at a higher rate than ever before. The average tenure of the most senior Executive branch officials is approximately 18 months. A growing number of incumbent Members of Congress do not stand for reelection even though the reelection success rate of incumbents is now over 90%. This growing trend toward early departure from public life shows that however strong the desire to serve may be, the financial penalties of remaining in public service are causing some of our most able officials to return to private life because the disparity in financial rewards becomes just too much.

As part of its deliberations, the Commission held two days of public hearings. Our witnesses included many of the nation's leaders in both the public and private sectors. Almost all expressed deep concern over the inadequate levels of compensation for top federal officials, and the signals these relatively low salary levels send to all citizens—and especially to incumbents and prospective appointees—as to how cheaply and lightly we value the work our highest public servants perform. The detrimental impact of inadequate compensation on the ability of these officials to provide for their families was especially noted as a cause of major anxiety.

While witnesses before the Commission agreed that no one serving in government should expect to be paid as much as for a comparable position in the private sector, they also agreed that when the differential exceeds 50%, as it does by a wide margin today, corrective steps are required.

Mr. James C. Miller III, until recently Director of the Office of Management and Budget, advised the Commission that the increases necessary to restore equity in salaries for top level Executive branch official could and

would be offset by overall reductions in other budgeted personnel costs *so as to have no effect on the level of Executive branch expenditures in the budget.* The testimony of the legislative witnesses persuades the Commission that a similar offset could be achieved in the Legislative branch.

Several witnesses also pointed out that because of their inadequate salaries, many Members of Congress have resorted to supplementing their income by accepting honoraria of up to $2,000 per occasion for making a speech or even attending a Washington meeting or other event. Currently, Representatives may receive outside earned income, including honoraria up to 30% [$26,850] of annual salary, while Senators may receive honoraria up to 40% [$35,800] of annual salary with no percentage limit on other forms of outside earned income.

The testimony indicated that the average annual level of honoraria income exceeds 20% of salary, with many Members receiving and retaining much larger amounts, and that in many cases, the payments come from interest groups with highly specific legislative axes to grind. Much of this testimony was given by leading and former Members of Congress. They agreed with other concerned witnesses that in order to maintain public confidence in the intregrity of Congress, Congressional salaries should be raised to adequate levels, and that at the same time, honoraria should be abolished.

SUMMARY OF MAJOR RECOMMENDATIONS

For the reasons stated in the previous section, the 1989 Commission Executive, Legislative and Judicial Salaries unanimously makes the following recommendations:

Recommendation #1: As part of this fiscal year 1990 budget submission, the President should recommend salary levels for senior members of the Executive, Legislative and Judicial branches which approximate in constant dollars the salaries set for these positions twenty years ago, with appropriate adjustments to maintain existing relative differentials between the various pay levels. The suggested recommendations for each position are shown in Table 1.

Recommendation #2: Congress should enact legislation to increase the President's salary, which has been fixed at $200,000 since 1969, to $350,000, adjusted for inflation for the calendar years 1989-1992. As Constitutionally required, this increase would not take effect until January 20, 1993.

Recommendation #3: Congress should enact legislation and each House should modify its Ethics Code to abolish honoraria (or payments that are the substantial equivalent of honoraria) as a permissible source of outside earned income for all three branches, effective when the recommended pay increases begin.

Recommendation #4: Congress should enact legislation and each House should modify its Ethics Code to specify, in addition to existing restrictions, that no official of the Executive, Legislative or Judicial branches may receive outside earned income for activities or services that conflict or appear to conflict with the performance of official duties.

Recommendation #5: Congress should enact legislation correcting current inequities in levels of compensation between positions. Such legislation should include the following:

- Raising the position of Chairman of the Federal Reserve Board from Level II to Level I of the Executive Schedule;
- In those Departments without Deputy Secretary positions (Health and Human Services, Education, Interior, Housing and Urban Development), raising the level of the second highest position to Level II;
- Raising the positions of the Commissioner of the Social Security Administration, the Assistant Secretary for Health, and the Administrator of the Health Care Financing Administration from Level IV to Level III;
- Raising the maximum salary level for Administrative Law Judges and judges who serve on Boards of Contract Appeals to that of members of the Senior Executive Service. Additionally, the Office of Personnel Management should conduct a comprehensive review of the General Schedule pay system for supergrades (GS-16—GS-18) in relation to the pay levels of the Senior Executive Service, and report back to the Congressional authorizing committees for legislative review.

THE LEGISLATIVE BRANCH

"I am not at all certain but that the Congress of the United States is institutionally incapable of setting its own salary. It's really not hard to understand that. It is the grand-daddy conflict of interest of all time.

"I don't think that's the system most Americans want. I think we as a nation are prepared to pay a fair price for a good and honest and capable government.

"The stumbling block in all of this is a system which ties all senior-level federal pay increases to Congressional pay raises. Members of Congress are naturally quite reluctant to raise their own pay, particularly when their salaries are so much higher than that of their average constituent.

"I proudly bear the title 'politician,' and I know how impolitic such self-generated pay raises can be, and I know why these pay raises have been habitually rescinded since at least 1816."

Howard H. Baker, Jr.,
Former Senate Majority Leader
Former White House Chief of Staff
1989 Quadrennial Commission Hearing
November 10, 1988

A striking parallel to Senator Baker's testimony occurred more than 170 years ago. *The Annals of Congress* report the following debate in the House of Representatives in March, 1816, between Henry Clay [Whig Party, 1815-1821] and John C. Calhoun [War Democrat, 1811-1817]:

Mr. Clay: ". . . The laborer is worthy of his hire; and if you do not give him the wages of honesty, it is to be apprehended the wages of corruption may, in process of time, come to be sought."

Mr. Calhoun: "What is the usual fact? Young men of genius, without property, . . . are elected; being tempted into public service by the honorable desire of acquiring distinction in the service of the country; they remain here until they have acquired some experience, and begin to be useful to the country; but are finally compelled to return to private life from the inadequacy of the pay. It is a great public misfortune; it is highly injurious to the proceedings of this House."

The Costs of Elective Office

Election to the House of Representatives or the Senate carries with it job requirements unlike any other federal office. To adequately serve a constituency, a Member must travel frequently between Washington and the district or state and maintain a residence there. Since Congress is now in session more than 200 days a year, it is usually necessary to maintain another home in the Washington, D.C. area. The reasonable and necessary business expenses of the job consume a very substantial percentage of a Member's current salary. When a Member's other family responsibilities are taken into account, most Members find it difficult to live on their current salaries. As a result, Members have resorted to the acceptance of honoraria from interest groups and other sources in order to supplement their federal compensation.

Many witnesses before this Commission have made the point that there is an inherent conflict of interest when Members of Congress are asked to vote on the level of their own salaries. A Member's personal political interest pulls him to vote against such an increase, even though the increase is clearly in the national interest. Moreover, when Members vote against increases for themselves, they usually vote against increases for the other branches as well. This is especially self-serving and contrary to the national interest because the Congress has legislated preferential rules governing the receipt of outside earned income that favor Congress over the other two branches, and allow Members of Congress to supplement their salaries through honoraria and other devices to a much greater extent than judges or officials of the Executive branch.

Honoraria and Other Forms of Outside Earned Income

"Honoraria" are payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material

interest in pending or anticipated legislation. The potential for abuse or the appearance of abuse is obvious to the public, and public faith in the integrity of the Members it elects is threatened by the steady growth of this practice. Only a substantial increase in official salaries, coupled with a total prohibition on the receipt of honoraria, can correct the problem.

Over the years Congress has adopted House and Senate rules and enacted legislation governing the practice of acceptance of honoraria in all three branches. The rules are different for each branch, and even between the House and Senate. A table comparing the widely differing statutes and rules is attached as *Appendix B* to this Report.

The Commission received testimony from present and former leaders of Congress and from citizen groups that the potential for impropriety in the present rules governing honoraria was so high that the practice of receiving honoraria should be eliminated. Some members of Congress now accept an honorarium of up to $2,000 for attending meetings with a few members of an interest group and listening to their views on a pending bill. Others receive honoraria in amounts vastly exceeding present maximum limits, give the excess to charities (as present law permits), but are entitled under tax laws and regulations to count the excess as part of their earned income for their "Keogh Plan" retirement set-asides, thus greatly increasing their annual tax deductions for such setasides.

The only principled argument that can be made for the practice of accepting honoraria is that official salaries are far too low and must be supplemented by honoraria so that a public official can meet his minimum family obligations. If honoraria be deemed the unfortunate but inevitable consequence of inadequate offical compensation, then once official compensation is made adequate, there is

no semblance of justification for the continuation of honoraria.

The Commission strongly recommends that the practice of accepting honoraria in all three branches be terminated by statute (and by appropriate changes in the House and Senate rules and in the Code of Conduct for United States Judges) at or about the time that the Commission's recommended salary increases, as they may be modified by the President, are allowed to take effect. For this purpose, honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium. The prohibition should be extended to all Congressional and judicial staff, some of whom are not covered by the present honoraria rules.

A similar but less urgent problem exists with other forms of outside earned income apart from honoraria. As shown in *Appendix B*, present law places a 15% of salary limit on such income in the Executive branch, a 30% of salary limit in the House and no limit in the Senate or in the Judicial branch. In each branch, however, certain forms of outside earned income are totally prohibited (e.g. law practice in the Senate), although the rules differ for each branch and between the House and Senate.

The Commission recommends that along with the elimination of honoraria, Congress enact legislation and each House modify its Ethics Code to specify that, in addition to existing restictions on particular activities and services, any activity or service engaged in by any senior official of the Executive, Legislative or Judicial branches to produce outside earned income should be prohibited if it conflicts with or appears to conflict with the performance of official duties. Conforming modifications should also be made in the Code of Conduct for United States Judges.

THE JUDICIAL BRANCH

"In the first ten years of my 17 year tenure, from '69 to '86, there were more judges who left the federal bench for economic reasons than in all the time from the beginning of the Constitution in 1789 up to 1969."

Warren E. Burger
Chief Justice of the United States, Retired
1989 Quadrennial Commission Hearing
November 10, 1988

"After 11½ years of 60-65 hour work weeks, in one of the business districts in the United States, my life had been threatened on two occasions, my 9 year old daughter's life had been threatened, my wife was still working, we had not traveled outside the country, and I was unable to foresee how I could afford to send my youngest daughter to the university of our choice, I came to believe that my employer had not treated me fairly in an economic sense.

"The decision to leave the bench was agonizing. However, for years I had been intrigued with the challenge of practicing with talented lawyers in a large, prestigious and active law firm. I took advantage of an excellent opportunity to pursue such a challenge. It is clear in my mind that the quantum increase in compensation was a strong inducement for me to leave the bench. In 1985, at age 57, I had limited productive years ahead, and I also knew that if I entered private practice I could afford to educate our youngest daughter, repair our house, my wife could retire and, finally, my earnings are somewhat comparable to the income earned by a number of law school classmates and many of the lawyers I have trained.

"On the other hand, being a United States District Judge, in my view, is being at the tip-top of the legal profession. I miss the honor and privilege of doing my best to provide extremely valuable public service to our country. I miss the Court."

Judge Robert M. Duncan
Former United States District Judge
Southern District of Ohio,
Eastern Division, 1974 to 1985
1989 Quadrennial Commission Hearing
November 11, 1988

"I don't feel badly when judges get second hand cars and keep them for ten years. They can live with that. I don't feel badly when judges have suits which are almost threadbare. They can live with that. And I don't feel badly if judges cannot afford country clubs. Society can survive with that. But for all of us as judges, we know that the passport of opportunity for us was education; the ability to attend the best universities in this person and then go out and make a contribution to hopefully improve the quality of life. And judges today are confronted with the real problem as to whether they can provide for their children the type of educational opportunities which they had."

Judge A. Leon Higginbotham, Jr.
United States Circuit Judge
United States Court of Appeals
for the Third Circuit
1989 Quadrennial Commission Hearing
November 11, 1988

It is often claimed that while judicial pay levels are adequate in major metropolitian areas, they are more than adequate in other parts of the country. However, the Commission received an unsolicited letter from a judge in Macon, Georgia, who had practiced law in a farming community of 6,000 and said that even in rural Georgia he could make more money in private practice than his judicial salary. His letter continued:

"I love the job and would sell off assets, if necessary, to meet my living expenses, the biggest of which is the education of my children. If I didn't have some farm and timberland that my father left me, I doubt if I would be so sure that I will spend the rest of my career on the bench."

Judge Duross Fitzpatrick
U.S. District Court Judge
Middle District of Georgia
Letter to the Commission
November 1, 1988

Inadequacy of Current Judicial Compensation

Service in the federal judiciary has long been regarded as the pinnacle of success and prestige in the legal profession, attracting attorneys of the highest caliber and widest experience. As previous Commissions have noted, the loss in real purchasing power of judicial salaries over the past 20 years *is threatening to diminish the quality of justice in this country by dissuading the best and the brightest in all sectors of our society from service on the federal bench.*

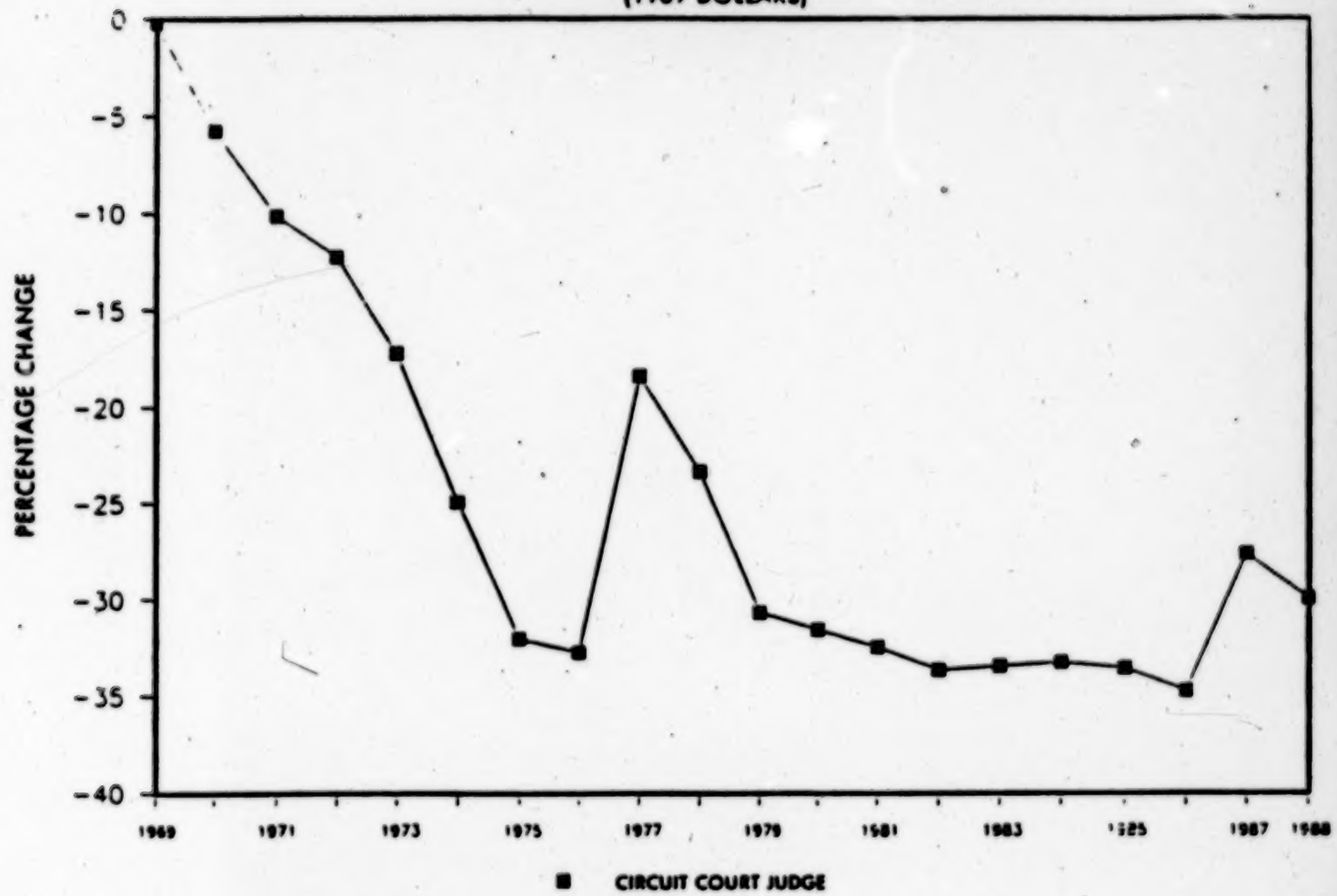
The Constitution provides that federal judges shall be appointed to serve "during good Behaviour" (i.e., for life), and that their compensation shall not be diminished during their time of service. The concept of lifetime service

with undiminished compensation was designed to protect the independence of judges by removing any concern that the President or Congress would curtail their time in office or reduce their salaries. Partly because of this concept and partly because our judges are now drawn from all social classes, the American public places more trust in our diversified and independent judiciary to define and uphold its rights than do the citizens of other democracies.

However, as the following chart shows, salary increases have not kept pace with the cost of living. The constant dollar value of federal judges' salaries has been eroded to less than 70% of what it was in 1969 [*Chart 7*]. At the same time, the workload of judges has increased dramatically. Despite several increases in the number of authorized judgeships in the last twenty years, caseloads per judge have increased sharply. Since 1969, average District Court caseloads have increased 53%, from 339 to 520 cases per judge per year. The appellate courts have experienced more than a 100% increase, with average caseloads rising from 123 cases per judge in 1969 to 249 in 1988. This combination of less pay for more work has caused many judges to leave the bench for private practice at much higher levels of compensation.

Chart 7

CIRCUIT COURT JUDGES PURCHASING POWER
(1969 DOLLARS)



Source: Office of Personnel Management.

Both the American Bar Foundation and the Judicial Conference Committee on the Judicial Branch conducted surveys of federal judges to learn the attitudes and future plans of federal judges if present salaries are not significantly increased.

According to the American Bar Foundation survey, "The Effect of Compensation on the Career Satisfaction Experienced by Federal Judges":

- Ninety-five percent of the responding active judges feel their compensation is inappropriate for the nature of the work they undertake and the level of professional achievement they have reached.
- In the absence of a significant increase in compensation 30 percent of the responding active judges plan to leave the federal bench before retirement; 30 percent of those who plan to leave early will do so in the next 5 years;
- Ninety-two percent of the respondents who indicated that they will curtail their tenure state that the low salary level is an important factor in their decisions.
- Judges appointed since 1980, with only 5 to 8 years experience on the bench, are more likely than those with longer judicial experience levels to resign their seats and return to private life.

The increasing number of resignations validate these statistics. In the 15 years from 1958 to 1973 there were only 6 resignations from the federal bench. But in the 15 years from 1974 through 1988 there have been 57. Exit inquiries to 26 judges who resigned in the last ten years, conducted by the Judicial Conference Committee on the Judicial Branch, showed that almost all of the departing judges noted financial considerations as a factor in their decision. The frequency of judicial resignations is now being matched by greater difficulties in recruitment. As Chief Justice Burger testified: "I know of one situation

where the first ten people who were invited to take the appointment on a Court of Appeals declined because they could not afford it. The 11th person accepted the appointment."

The Judicial Conference's survey indicates that 73% of judges now on the bench took a pay cut when appointed, and that the average salary was $69,708. A review of law firm pay scales clearly demonstrates the dilemma for a successful attorney with more than 15 years experience and family obligations. The Altman and Will *1988 Survey of Law Firm Economics* indicates that partners in law firms in cities of 250,000 to 500,000 with 10 to 15 years experience make an average of $125,504; in cities over one million they make an average of $140,577, while those who are the most successful average $217,304. Judges who leave the federal bench can earn much more than these average figures.

Indeed, we now pay our judges less than other leading nations. Great Britain and Canada, the two common law systems most like our own, each pay their judges significantly more than we do.

Honoraria and Outside Earned Income

Since the Code of Conduct for United States Judges restricts most forms of outside earned income for judges, the acceptance of honoraria has remained a relatively minor source of supplemental income for the judiciary. Judges may however, subject to the proper performance of their judicial duties, speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice. They may likewise speak, teach, and write on non-legal subjects as long as these activities do not detract from the dignity of the office or interfere with the performance of judicial duties. They may accept honoraria for such services up to $2,000 per appearance. In 1987, only 110 of 907 Federal

District and Circuit Court judges reported accepting any honoraria. Only nine of these judges received more than $5,000 for the year.

If Congress allows substantial increases for all branches to take effect while it also abolishes honoraria for its own members, it is appropriate that honoraria be abolished in all three branches. This would leave judges free to receive outside compensation for continuing activities such as writing scholarly texts or sustained law teaching since such activities are excluded from the definition of honoraria, and usually do not conflict or appear to conflict with their official duties.

CONCLUSION

Last year we celebrated the Bicentenary of our Constitution. We engaged in justifiable self-congratulation knowing that a small group of extraordinarily wise men had created the greatest charter of government ever known to mortal man. How fortunate for us as a people that our Constitution has flourished for two centuries as the embodiment of freedom and serves as the symbol of democrary around the world.

But a Constitution is not self-enforcing. Wise men and women in all branches of government are needed to govern the nation and to give living meaning to the Constitution's precepts and guarantees.

The wise men and women we need can be found in all walks of life and all levels of economic resources. Our government has never been, nor should it ever be, a government of, by, or for the rich. Talented men and women at all income levels can and do make valuable contributions to our federal public service. Just as we need their talents, they deserve to be equitably compensated for the service they render and for the conctributions they make for the public good. Fairness to them is in the self-interest of us all.

APPENDIX B

SUMMARY OF EXECUTIVE, LEGISLATIVE AND JUDICIAL RULES ON HONORARIA, OUTSIDE EARNED INCOME, TRAVEL AND FINANCIAL DISCLOSURE

	EXECUTIVE	*CONGRESS*	*JUDICIAL*
1. **Honoraria** (Appearance, speech or article for which participant gets paid, excluding awards and payments for continuing services (e.g. teaching)	*Federal Election Campaign Act Amendments, 2 U.S.C. 441(i)*: $2,000 limit for each appearance, speech or article, exclusive of travel.	*Federal Election Campaign Act Amendments,* 2 U.S.C. 441(i): $2,000 limit for each appearance, speech or article, exclusive of travel. *Home Rule XI.VII:* Reinforces $2,000 limitation. (See also earned income ceiling *infra*).	*Federal Election Campaign Act Amendments, 2 U.S.C. 441(i):* $2,000 limit for each appearance, speech or article, exclusive of travel.
2. **Outside earned Income** (Practice of professional skills, books, etc.)	*Ethics in Government Act of 1978 as Amended:* 15% of salary limitation on the annual outside earned income, including honoraria of Presidential appointees. *Conflict of Interest, 18 U.S.C. 208:* Generally prohibits taking any action on any matter in which employee has a personal financial interest. *Executive Order 11222:* Prescribes Standards of ethical conduct for Government officers and employees. Prohibits any interest that conflicts with or appears to conflict with official duties.	*House Rule XI.VII:* Limits all outside earned income, including honoraria received by Representatives to no more than 30% of their Congressional salary. *Senate:* 2 U.S.C. 31-1 provides no outside earned income limit. Aggregate honoraria may not exceed 40% of Senator's annual salary. (P.L. 98-190).	*Code of Conduct for United States Judges, Canon 6:* A judge may receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by the Code of Judicial Conduct if the source of such payment doesn't give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety. *Canon 6A:* Compensation should not exceed a reasonable amount nor should it exceed what a non-judge would receive for the same activity.

	Office of Personnel Management Regulations (part 735) are the implementing regulations for the Executive Order and are the general standard of conduct for the Executive branch.		
3. **Other Overriding Limits**	*OPM Regulations (Part 735.203):* An employee who is a Presidential appointee shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information.	*House and Senate:* Both Representatives and Senators are prohibited from: – Receiving or soliciting compensation for "services rendered or to be rendered" before Federal agencies (18 U.S.C. 203). – Engaging in certain acts of "self dealing" with private foundations (26 U.S.C. 4941, 4946).	*28 U.S.C. 454.* The practice of law by justices and judges of the United States prohibited. *Canon 5* A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties or exploit his judicial position.
	Section 209 of 18 U.S.C. prohibits all government employees from receiving compensation from any source other than the Federal Government for their official duties. In the context of lecturing and writing, Section 209 prohibits a government employee, with limited exceptions, from accepting an honorarium or other compensation from an outside source for speeches given or articles written in the course of the employee's official duties. In light	– Receiving any compensation of any kind from foreign governments (U.S. Constitution, Art. 1, Sec. 9). – Practicing in some areas of laws (18 U.S.C. 203, 204; 25 U.S.C. 70; 46 U.S.C. 1223; 5 U.S.C. 501). – Accepting benefits which "might be construed by reasonable persons as influencing the performance of (their-official duties" (72 Stat., Part II, B 2, para. 5).	– A judge may hold and manage investments and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business wholly owned by members of the judge's family. A judge should manage his financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious

of that provision, a government employee participating officially in a conference or seminar sponsored by a private entity may not receive an honorarium or other supplementation of salary from the sponsoring entity.

With respect to lecturing and writing as an outside activity, *Section 202 of Executive Order 11222* establishes the framework for Executive branch policy in this area as follows:

"An employee shall not engage in any outside employment, including teaching, lecturing or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing and writing by employees are generally to be encouraged so long as the laws, the provisions of this Order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed."

– Receiving compensation as a result of "influence improperly exerted" from their Congressional position [House Rule XI.II(3)); Senate Rule XXXVII(1.)].

Senate: Senators are prohibited from:

– Engaging in outside employment for compensation which is in conflict with the performance of official duties [Senate Rule XXXVII(2)].
– Affiliating with a firm, partnership, or association for the purpose of providing professional services for compensation; permitting his or her name to be used by such an organization; and practicing any profession for compensation "to any extent" during regular office hours of the Senate [Senate Rule XXXVII(5)].
– Serving on the board of any regulated or publicly held business corporations unless certain specified conditions have been met [Senate Rule XXXVII(6)].

financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor or loan from anyone except in specific conditions.

Travel Expenses	*Federal Election Campaign Act Amendments 2 U.S.C. 441(i):* Actual travel and subsistence expenses for such person and his/her spouse or an aide. *General Services Admimistration* issues travel regulations that apply to all Federal agencies: Additionally, certain agencies have gift acceptance authority which allow private groups to pay travel.	*Federal Election Campaign Act Amendments 2 U.S.C. 441(i):* Actual travel and subsistence expenses for such person and his/her spouse or an aide. *Congressional Ethics Rules* – Members are banned from accepting gifts worth more than $100 from groups, individuals or corporations with a direct interest in federal laws. – The Senate defines that interest by the existence of a PAC or registered lobbyist. – The House definition bans gifts from interests with registered lobbyists or others with a direct interest in legislation before Congress. – However, travel can be reimbursed by interest groups for expenses incurred in connection with speaking engagement and fact finding tours. [Senate Rule XXXV and House Rule XI III(4)].	*Federal Election Campaign Act Amendments 2 U.S.C. 441(i):* Actual travel and subsistence expenses for such person and his/her spouse or an aide. *Canon 6B:* Limit expense reimbursement actual cost of travel, food and lodging incurred by the judge and where appropriate, by the judge's spouse.

TO SERVE WITH HONOR:

REPORT OF THE
PRESIDENT'S COMMISSION ON
FEDERAL ETHICS LAW
REFORM

March 1989

RECOMMENDATION 6

The Commission recommends (1) that federal employees in all three branches be prohibited from receiving honoraria, (2) that existing criminal prohibitions against supplementing government salaries apply to all three branches, and (3) that senior employees in all three branches be covered by a uniform percentage cap on outside earned income, but that the President have authority to exempt categories of earned income from the cap that do not present significant issues of ethical propriety or interfere with the full performance of job duties.

A. Present Law

A variety of statutes and rules limit receipt by federal employees of honoraria and outside earned income. Employees in all three branches of government are covered by 2 U.S.C. § 441i, which prohibits the receipt of an honorarium of more than $2,000 (exclusive of travel and subsistence). The statute allows payments in excess of the $2,000 cap to be donated to charity. In addition to this cross-cutting statute, there are other, branch-specific, restrictions on receipt of honoraria and outside earned income. There are also additional restrictions as to particular types of outside activities.

In the executive branch, one of the chief existing limitations is 18 U.S.C. § 209, which criminalizes private supplementation of the salaries of executive branch employees other than special government employees. Specifically:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States . . . from any source other than the Government of the United States . . .; . . .

. . .

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 209(a). It is also a crime to make a payment, the receipt of which violates the above prohibition. The prohibition does not prevent an individual from continuing to participate in a bona fide pension, retirement plan, health plan, or other employee welfare or benefit plan maintained by a former employer.

The § 209 prohibition prevents executive branch employees from receiving supplementary compensation for activities that fall within the scope of their ordinary duties. Thus, executive branch employees cannot, for example, receive honoraria for speeches given in their official capacities. Similarly, executive branch employees cannot be paid for writings done as a part of their official employment, and the Office of Government Ethics has interpreted this provision to prohibit the designation of a third party to receive any such payments that cannot be received directly. As a result of § 209 and Executive Order 11222, 3 C.F.R. 306 (1964-1965), agency heads, the highest level Presidential appointees in the Executive Office of the President, and full-time members of boards and commissions appointed by the President are not permitted to receive anything of monetary value for any consultation, lecture, discussion, writing or appearance the subject of which is devoted substantially to the responsibilities of their agency. (Another frequent consequence of § 209, unrelated to the receipt of honoraria, is that it prevents individuals entering the executive branch from receiving severance pay based on future government service rather than past service to their employer.) There is no statute comparable to § 209 that applies to the other two branches of government.

The other key statutory limit applicable to the executive branch is § 210 of the Ethics in Government Act, which limits outside earned income for certain high-paid executive employees to 15 percent of the individual's salary. Covered employees are (1) those at compensated at GS-16 or above in nonjudicial positions who are required to be appointed by the President with Senate confirmation, and (2) White House Office employees compensated at Executive Level II or above.

In the legislative branch, no Member of Congress may receive honoraria (exclusive of travel expenses) in excess of 40 percent of the individual's salary. 2 U.S.C. § 31-1. Excessive honoraria must be donated to charity. *Id.* In the House of Representatives, House Rule XLVII further restricts the total amount of honoraria (exclusive of travel costs) and outside earned income (from personal services) to no more than 30 percent of a Member's salary during single calendar year. Honoraria amounts must be within the usual and customary value for a speech, article, or similar activity.

Outside income of judges is not restricted by law. Canon 6 of the Code of Conduct for United States Judges permits judges to receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by the Code, to the extent that there is no appearance of impropriety. There is no dollar limit but the compensation must not exceed a reasonable amount nor what a person who is not a judge would receive for the same activity. Judges may speak, write, and lecture on legal and non-legal topics as long as their activities do not detract from the dignity of the office or interfere with the performance of their judicial duties. Canon 5.

In addition to these limitations on the *income* that can be earned from particular kinds of activities, an eclectic set of rules and statutes set substantive limits on the kind of

activities that employees are allowed to undertake. Executive branch standards of conduct regulations, for example, often require prior approval of outside activities by federal employees and prohibit outside activities that interfere with an employee's performance of job duties. Employees are also typically prohibited from advancing a private interest through the use of non-public official information gained in connection with their employment and are prohibited from using official resources (such as time, personnel, and supplies) for private activities. There are also special statutes applying to specific positions, *e.g.*, 37 U.S.C. § 801(a), prohibits an active duty naval officer from employment by anyone furnishing naval supplies or war materials to the United States.

As to the legislative branch, Senate Rule XXXVII prohibits Senators and staff members paid more than $25,000 per year from being affiliated with a firm for the purpose of providing paid professional services and also in many circumstances prohibits service on the board of directors of for-profit publicly held corporations or publicly regulated corporations.

With regard to the judiciary, the practice of law by judges is prohibited by 28 U.S.C. § 254. In addition, Canon 5 of the Code of Conduct for United States Judges prohibits a judge from serving as an officer, director, active partner, manager, advisor, or employee of any business other than a business wholly owned by members of the judge's family.

B. Considerations

The Commission took special note of the extreme lack of uniformity across the three branches of government in the rules governing honoraria and other outside income. Whereas executive branch officials cannot receive any out-

side compensation at all for speeches in their official capacities, Members of Congress are free to accept honoraria for such speeches (as well as compensation for travel expenses, which may often be above those required for the event itself). Borrowing a definition from the Quadrennial Commission, we are using the term honoraria at this point to include "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-government group." Commission on Executive, Legislation and Judicial Salaries *Fairness for Our Public Servants* 24 (1988) [hereinafter cited as the Quadrennial Commission Report].

We recognize that speeches by federal officials can help inform the public or particular groups and may encourage interchange between the public and private sectors. Nevertheless, we can see no justification for perpetuating the current system of honoraria. Honoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor. The companies that pay honoraria and related travel expenses frequently deem these payments to be normal business expenses and likely believe that these payments enhance their access to the public officials who receive them. Thus, we agree with the Quadrennial Commission that "public faith in the integrity of the Members it elects is threatened by the steady growth of this practice." Quadrennial Commission Report at 24. The further harm in tolerating honoraria is that such payments encourage outside speeches and travel by federal officials and employees, activities that take time and energy away from the individual's other federal duties.

Although we are aware of no special problems associated with receipt of honoraria within the judiciary, the Commission – in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government – joins the Quadrennial Commis-

sion in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government. In recommending this ban, we also recognize, as did the Quadrennial Commission, that the statutory definition of honoraria must be broad enough to—

> close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel; sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium.

Id. To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities. It is worth stating, however, that as we conceive of it, the bar on receipt of honoraria would not prohibit payment for continuing activities such as teaching academic, for-credit, courses, or publication of a book through a recognized publishing house to be distributed through usual and customary channels.

We recognize that banning honoraria would have a substantial financial cost to many officials. We feel strongly, however, that the current ailment is a serious one and that this medicine is no more bitter than is needed to cure the patient.

In addition, to carry out our general mandate of making more equitable the ethical standards for the three branches of government, the Commission recommends the enactment of legislation extending 18 U.S.C. § 209 to Congress and the judiciary. We can think of no reason why supplementation of salaries is any more acceptable in the legislative and judicial branches than in the executive branch.

This proposed extension of § 209 would newly make it a criminal offense for any official or employee in the legislative or judicial branches to accept private compensation for the performance of their government duties.

A number of issues would need to be worked out concerning the effect of § 209 as to the legislative and judicial branches. The basic effect of the change, however, would be to expand the criminal prohibition to cover the receipt by Members of Congress and other legislative branch employees of payment for speeches or writing dealing with their official responsibilities or topics that are the subject of pending legislation. Similarly, the amended statute would prohibit judges and other judicial branch employees from being paid for speeches discussing pending cases (which they may be unlikely to do in any event) or about the workings of their courts. (Extending the scope of § 209 would also extend the limitations mentioned earlier on receipt of severance pay intended as a supplement to government salary.)

Finally, the Commission is also recommending that Congress enact legislation establishing a uniform cap on the outside earned income of senior officials in all three branches of the federal government. A number of Commission members believe that there are categories of outside activity that neither interfere with the full performance of official duties nor pose significant ethical issues. As a result, in order to ensure that this outside-earned-income limit is not needlessly restrictive, we recommend that the legislation give the President the authority to grant exemptions from the cap for earned income resulting from categories of outside activities that he determines to meet these two standards.

The level of the cap should be set at a percentage of the official's salary. We recommend that the percentage level be determined by Congress after appropriate hearings, but

we are inclined to believe that an appropriate figure would be closer to the 15-percent limit currently applicable to senior executive branch employees than, say, the 30-percent limit applicable to Members of the House of Representatives. For parallelism with the executive branch, the individuals subject to this income cap in the legislative and judicial branches would be Members of Congress, judges, and other officials and employees in both branches who are not in the career civil service and whose positions are compensated at GS-16 and above.

The Commission recognizes that federal employees engage in a wide range of income-producing activities. Many high level officials teach an occasional college or graduate school course. For example, many federal judges may have accepted judicial appointments in the knowledge that the Code of Judicial Conduct permitted them to continue teaching law courses and publishing learned treatises or texts. Other officials may write scholarly articles or even novels. Still others may raise pedigreed horses, produce and market gourmet food, lead exercises classes, or engage in any number of other money-making activities entirely unrelated to their federal jobs. As a general matter, we would not want to preclude or discourage these activities, which can benefit both the federal employees and society at large.

In order for an employee to do his job properly, however, such activities need to be restricted in time and scope to avoid the real risk that outside income-producing activities will take time and energy away from official activities (even if only through the accumulation of such minor intrusions such as occasional phone calls and concomitant use of support staff to take phone messages). Of course, the same kinds of activities may also be carried out without thought of payment. In a necessary effort to generalize, however, the Commission believes that paid

outside work is more likely to engross the federal employee to the extent of creating an interference with the individual's basic duties. This seems to be particularly likely to occur when the outside income assumes a substantial proportion of an official's compensation in relation to the federal salary.

In closing, it is worth pointing out that none of the three components of this recommendation is intended to affect existing rules regarding whether federal employees can undertake any particular activity. The reforms included in this recommendation go only to the question of whether an employee can be *paid* for a particular activity, not whether the employee is or is not allowed to engage in the activity in the first place.

C. Alternatives Considered

The Commission considered whether to tie the proposed restrictions on honoraria and outside earned income to an increase in the current low pay levels for many federal workers. Although we recognize that federal salary levels are too low in all branches (and particularly in the judiciary), we did not see, in good conscience, how we could suggest holding off on the adoption of our recommendations until pay levels were raised to a more adequate level. First, we regard the current state of affairs as to honoraria in particular as unacceptable in the extreme, and believe that we cannot wait until an unspecified date in the future to end this harmful practice. We believe, however, that in addition to enacting a law abolishing honoraria payments in all three branches, Congress and the President should promptly reconsider raising the salaries of top officials in all three branches to offset the past erosion of these salaries by inflation. To defuse some of the political concerns about a pay raise, one approach

might be for Congress to enact a raise that does not take effect, as to any given congressional seat, until after the next general election for that seat.

The Commission also considered whether it was appropriate to impose a flat ban on outside earned income by all federal employees, or in the alternative, by the highest paid federal employees. In view of the diverse circumstances of federal employees, we felt that an across-the-board ban on outside earned income was unnecessary and too harsh. Such a ban would prevent all federal employees from even the most innocuous weekend income-producing activities, such as selling prize-winning roses, baby-sitting, or, conceivably, holding a garage sale. We saw no need to micro-manage the lives of federal employees to this degree.

The Commission considered whether particular types of employment should be exempted by statute from the limitation on outside earned income. Royalty income in particular was considered as one possible exception. The Office of Government Ethics considers advances on royalties paid by a publisher during the period in which a book is being written to be earned income, but royalties paid to the author after the work is published are treated as income generated by a property interest and are not counted against the current 15-percent limit. Rather than try to assess the merits of the many particular types of outside activity that generate earned income, however, we thought it best to give the President the authority to exempt from the ban activities that he determines neither interfere with performance of official duties nor represent an ethical problem.

In the Supreme Court of the United States

No. 93-1170

UNITED STATES, ET AL.,

PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ORDER ALLOWING CERTIORARI. Filed April 18, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

April 18, 1994

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